Notre Dame Journal of Law, Ethics & Public Policy

Volume 5
Issue 2 *Symposium on Serious Juvenile Crime*

Article 5

1-1-2012

# Cracking Down on Juveniles: The Changing Ideology of Youth Corrections

Martin L. Forst

Martha-Elin Blomquist

# CRACKING DOWN ON JUVENILES: THE CHANGING IDEOLOGY OF YOUTH CORRECTIONS

MARTIN L. FORST*
MARTHA-ELIN BLOMQUIST**

Juvenile justice policymakers have embarked on a precarious course. For the past fifteen years, they have changed in fundamental ways the system's philosophy, structure, and procedures. These changes have serious implications for the justifications underlying the existence of a separate system for juveniles and its availability to youthful offenders.

This article explores two areas of change in the legal framework of the juvenile justice system that have affected the juvenile court's ability to handle youths charged with criminal behavior. One set of changes involves removing serious juvenile offenders[1] from the juvenile justice system through waiver or transfer for prosecution in criminal court. The other set of changes has made the sanctions imposed by juvenile justice system officials more punitive.

To provide a context for understanding these changes, the authors offer a brief review of the original philosophy of the juvenile justice system, followed by a summary of the criticisms of the system that have led to recent reforms. Details are then presented of four reform strategies used by legislators across the country to give social protection and just deserts higher priorities in policies governing the handling of youthful offenders. These strategies include: 1) easing the process and grounds for waiving youths to criminal court; 2) incorporating punishment, offender accountability, or public protection into

* Senior Research Associate, The URSA Institute, San Francisco, CA.
** Jurisprudence and Social Policy Program, Boalt Hall School of Law, University of California, Berkeley.

1. Although widely used in both statutes and in the juvenile justice literature, the term "serious juvenile offender" remains vague and appears to have no clear or universal definition. For discussion of the need for greater clarity in defining the serious juvenile offender, see generally Armstrong and Altschuler, *Conflicting Trends in Juvenile Sanctioning: Divergent Strategies in the Handling of the Serious Youthful Offender*, 33 JUV. & FAM. CT. J. 15 (1982). See also Fagan & Hartstone, *Strategic Planning in Juvenile Justice—Defining the Toughest Kids*, in VIOLENT JUVENILE OFFENDERS (R. Mathias, P. DeMuro & R. Allinson eds. 1984).

the purpose clauses of state codes governing the juvenile court; 3) administering juvenile court sanctions based on a system of determinate sentencing; and 4) imposing mandatory minimum periods of confinement on youthful offenders adjudicated for specified serious crimes.

The article concludes by considering the effects of these reforms. They appear to expose youthful offenders to new burdens and limited opportunities for completing their education and development. Considered as well are the implications of these reforms for the broader set of legal and social policies society uses to regulate youths and to facilitate their transition from childhood to adulthood.

## I. ORIGINAL PHILOSOPHY OF JUVENILE JUSTICE

Since the late nineteenth century, the juvenile justice system in this country has rested on a philosophy of rehabilitation and individualized justice.[2] Under the rehabilitative or treatment model, the state's charge was to act in the best interests of the child, whether the youth before the juvenile court was considered dependent or delinquent.

The juvenile justice system was the product of efforts by Progressive reformers at the turn of the century to change the way children were treated by the legal system.[3] Specifically, the Progressives envisioned a separate system of justice which took cognizance of their belief that juveniles were different from adults and needed to be protected, nurtured, and treated, rather than held completely responsible and punished for their wrongdoing. Underlying the Progressives' reform agenda was the assumption that minors were not fully formed—physically or mentally—and needed to complete their cognitive, social, and moral development before being expected to shoulder the burdens of adulthood. It was the state's responsibility—through the enactment of child labor laws, compulsory educa-

2. For general reviews of the history of the juvenile court, see E. RYERSON, THE BEST-LAID PLANS—AMERICA'S JUVENILE COURT EXPERIMENT (1978); S. SCHLOSSMAN, LOVE & THE AMERICAN DELINQUENT (1977); A. PLATT, THE CHILD SAVERS (1977); Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970).

3. On the role of the Progressives in juvenile justice reform, see generally R. MENNEL, THORNS & THISTLES: JUVENILE DELINQUENTS IN THE UNITED STATES, 1825-1940 (1973); J. ADDAMS, THE SPIRIT OF YOUTH AND THE CITY STREETS (1909); J. HOLL, JUVENILE REFORM IN THE PROGRESSIVE ERA (1971); Schlossman & Wallach, *The Crime of Precocious Sexuality: Female Delinquency in the Progressive Era*, 48 HARV. ED. REV. 65 (1978); A. PLATT, *supra* note 2; S. SCHLOSSMAN, *supra* note 2.

tion, and the juvenile court—to ensure that juveniles completed this development. Furthermore, their socialization process was to be supervised by professional educators and, when necessary, by social workers and treatment experts.

By invoking the doctrine of *parens patriae*—that is, the responsibility of the state to care for persons who are unable to care for themselves or whose families are unable to care for them[4]—juvenile court judges were given the authority to assert the state's guardianship over youthful offenders. Rather than subjecting juveniles to the rigors of the criminal trial or the harsh conditions of prisons and jails used to house adult offenders, juvenile court judges were to act benevolently and protectively toward the minor. In the words of one of the pioneers of the juvenile court, Judge Julian Mack, it was the obligation of the judge when assessing a juvenile offender

> to find out what he is physically, mentally, and morally, and then, if . . . [the judge] learns he is treading the path that leads to criminality, to take him in charge, not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen.[5]

Because youths, almost by definition, were impulsive yet malleable, the Progressives asserted they were not completely responsible for acts of wrongdoing. They should not be held liable in the way the criminal law holds adults liable, because they had not yet achieved the cognitive or moral maturity associated with adulthood. Moreover, the Progressives believed that the causes of crime did not lie within the will of the individual—especially not within an individual whose moral code was only partially formed. Rather, they believed the causes of crime came from the broader social environment—the neighborhood, the family, and the specific childrearing practices of parents. Delinquency was viewed as an illness brought on by the social diseases of poverty, parental neglect, ignorance, and urban decay.[6]

The sentencing structure proposed by the Progressives for the juvenile justice system was a logical extension of the under-

4. For a review of the history of the *parens patriae* doctrine as the legal authority for the juvenile court, see Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C.L. REV. 205 (1971); Cogan, *Juvenile Law, Before and After the Entrance of "Parens Patriae,"* 22 S.C.L. REV. 147 (1970).

5. Mack, *The Juvenile Court as a Legal Institution*, in PREVENTIVE TREATMENT OF NEGLECTED CHILDREN 297 (H. Hart ed. 1910).

6. *See generally* W. HEALY, THE INDIVIDUAL DELINQUENT (1924); A. FINK, CAUSES OF CRIME (1938).

lying philosophy that delinquency was an illness the state could cure by providing individual and expert attention to the unique circumstances attending each delinquent youth's situation. To take account of variations in the causes and cures of delinquency, state juvenile codes gave juvenile justice personnel—judges, probation officers, training school officials, and parole boards—broad discretion in the control they could exercise over a young offender. Juveniles could be wards of the court or the juvenile correctional system for an indeterminate period up to the age of majority, which typically ranged from eighteen to twenty-one years. Whether under probation supervision in the community or confined in a state-level institution, each youth's "progress" in receiving treatment and training would be carefully monitored to determine, on an individual basis, whether they were ready for release into the community or discharge from state supervision.

In more recent discussions of the jurisprudence of youth, legal scholars have given the assumptions underlying the separate system of justice for juveniles a modern gloss. Policies on driving, the employment of minors, compulsory education, voting, drinking and so forth are based in part on the recognition that individuals in their youth possess incomplete reason and maturity. In this view, juveniles continue to require the protective intervention of the state.

In creating adolescence as a distinct life phase, modern society has provided youths with opportunities gradually to increase their freedoms and responsibilities. Especially in their mid to late teens, juveniles begin to assume the privileges and burdens associated with adulthood. As a status of semi-autonomy, adolescence serves to facilitate an individual's transition from the total dependency, immaturity, and nonresponsibility of childhood to the full independence, maturity, and responsibility of being an adult. Franklin Zimring has likened the status of adolescence to that of a "learner's permit" for adulthood.[7] On the one hand, the idea of a learner's permit represents a continuing belief that youths are different from adults in significant ways—they are less experienced, knowledgeable, judicious, or appreciative of the consequences of their behavior. On the other hand, the learner's permit concept suggests that adolescents, in engaging in activities that require judgment, decisionmaking, and responsibility—e.g., working part-time,

7. *See* F. ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENCE 89-96 (1982). For a history of adolescence in America, see J. KETT, RITES OF PASSAGE: ADOLESCENCE IN AMERICA, 1790 TO THE PRESENT (1977).

driving a car, voting, joining the military—are taking steps that bring them closer to adulthood. Through these steps, young people acquire the ability to handle both the privileges and burdens of full independence.

The theory of adolescence that underlies many of our contemporary regulatory policies towards youth and serves as an updated version of the justifications Progressives proffered for having a separate system of correctional interventions for youths asserts that adolescents, by virtue of a few more years of life experience with exercising reason and independent judgment, are more mature than their younger counterparts. At the same time, they have yet to obtain the full complement of judgment and maturity the legal system attributes to individuals who have reached the age of majority and who are to be held fully blameworthy for their acts of wrongdoing. Such a theory of adolescence implies that youths should continue to be treated differently from adults, even when by appearance and behavior, they may seem adult-like. As Zimring suggests:

> Equal treatment for wrong-doing seems inappropriate to the transitional status of the learner . . . . [N]o learning role is complete without, in some measure, learning responsibility for conduct. Thus, part of the initiation into the adult role is building toward adult responsibilities. Just as the learning theory of adolescence implies a transition toward adulthood, so too it also implies a progression toward adult levels of responsibility. The adolescent must be protected from the full burden of adult responsibilities, but pushed along by degrees toward the moral and legal accountability that we consider appropriate to adulthood.[8]

## II. Mounting Criticisms of the Traditional System

### A. *Concerns for Procedural Justice*

Although there have been sporadic criticisms of the juvenile justice system since its inception at the turn of the century,[9] extensive and persistent complaints began to surface starting in the 1960s. Criticisms have been directed at all facets

8. Zimring *supra* note 7, at 95-96.

9. *See, e.g.*, Waite, *How Far Can Court Procedure Be Socialized Without Impairing Individual Rights?*, 12 J. Crim. L. & Criminology 339 (1922); Olney, *The Juvenile Courts—Abolish Them*, 13 Cal. St. B.J. 1 (1938); Note, *Due Process in the Juvenile Courts*, 2 Cath. U.L. Rev. 90 (1952); Paulsen, *Fairness to the Juvenile Offender*, 41 Minn. L. Rev. 547 (1957); Allen, *The Juvenile Court and the Limits of Juvenile Justice*, 11 Wayne L. Rev. 676 (1965); Welch, *Delinquency Proceedings—*

of the system—its underlying philosophy, the practices followed by juvenile authorities, and the results of the system's interventions.

The first wave of criticisms, beginning in the 1960s and extending into the 1970s, focused largely on the *procedural* infirmities of the juvenile justice court. At that time, empirical studies on the juvenile system's operations and renewed constitutional challenges to its legal doctrines raised questions about injustices resulting from the informality of court hearings. The broad discretionary authority of juvenile justice officials was specifically attacked. Because the juvenile justice system had been founded on a theory of benevolent state intervention intended to protect and help delinquent youths, due process rights were never considered important. Unlike the situation of the adult defendant facing trial and punishment for his criminal acts, the youth's relation with the state in a hearing before the juvenile court judge was deemed to be nonadversarial. The doctrines of *parens patriae* and the child's best interests assumed that the interests of the child were synonymous with the interests of the state. Children enmeshed in the juvenile justice system did not need procedural protections because the proceedings were civil in nature and the state was attempting to help or treat them.

Critics began to question the major assumptions underlying the jurisprudence of the juvenile court, and to recognize the *de facto* punitive characteristics of the juvenile court's sanctions. A concern for procedural protections in juvenile court decision processes grew in part as it became more apparent that in practice the functions of the juvenile justice system closely resembled those of the criminal justice system—punishment, deterrence, and incapacitation of persons who violated the criminal law. To the extent that the aims of the juvenile justice system increasingly approximated those of the criminal justice system, critics argued that juvenile offenders should be accorded the procedural safeguards granted to adults.

Moreover, the push for procedural protections came from people concerned about the injustices that followed from the broad discretion given to officials in the commitment and release of juvenile offenders. Research revealed that this broad discretion resulted in questionable inequalities in the duration and type of intervention or treatment ordered by juvenile authorities. Critics of this discretion argued that even if it

---

*Fundamental Fairness for the Accused in a Quasi-Criminal Forum*, 50 MINN. L. REV. 653 (1966).

could be demonstrated according to scientific standards of proof that the system rehabilitated youths, the traditional model of "individualized justice" should be abandoned simply because of the inequities inherent in it.[10]

Attention to the inadequacies of juvenile court procedures was also prompted by concerns for the constitutional rights of juveniles and for the negative labeling inherent in delinquency proceedings. Under the "best interests of the child" standard, the interests of the youth, the family, and the state were regarded as being mutual. Francis A. Allen was one of the first to point out the conflicting goals of the juvenile justice system, and to ask whether the system could do simultaneously what was in the best interests of the child *and* the best interests of the state.[11] Increasingly, observers of the juvenile justice system said "no," that these two interests frequently conflict.

Legal reformers began to assert that juveniles, like adults, had liberty interests that deserved protection when threatened by the state's coercive powers, regardless of whether such powers were to be used to help a juvenile offender or to protect the public. Juveniles did not have the range of liberties adults had by virtue of their dependence and immaturity. Yet, they had an interest in protecting their limited freedom from state interventions, especially when such interventions involved coerced deprivation of familiar surroundings and the company of family and friends. As Justice Fortas noted:

> However euphemistic the title, a "receiving home" or an "industrial school" for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes, ". . . a building, with white washed walls, regimented routine and institutional hours . . . ." Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees and "delinquents" confined with him for anything from waywardness to rape and homicide.[12]

The juvenile court hearing was intended to focus attention on the youth's problems as well as to shield the minor from the

10. *See, e.g.*, Arnold, *Race and Ethnicity Relative to Other Factors in Juvenile Court Dispositions*, 77 AM. J. SOC. 211 (1971); Scarpitti & Stephenson, *Juvenile Court Dispositions: Factors in the Decision-Making Process*, 17 CRIME & DELINQ. 142 (1971); Wheeler, *Juvenile Sentencing and Public Policy: Beyond Counterdeterrence*, 4 POL'Y ANALYSIS 33 (1978).

11. *See* F. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE (1964).

12. *In re* Gault, 387 U.S. 1, 27 (1967).

stigmatizing effects of the criminal process. However, reformers asserted that the act of wrongdoing that brought the child to the court's attention should not be ignored. Moreover, in practice, adjudication in juvenile court for a delinquency petition—even without the openness of a public trial and the legal formulas for culpability and evidence—carried negative labels for the child.

Reforms adopted to address these problems largely involved the extension of procedural safeguards to juveniles whenever they were charged with wrongdoing and adjudicated in the juvenile court.[13] The appellate judiciary began a procedural revolution in the late 1960s with the *Kent*[14] and *Gault*[15] cases. Extended through *Winship*[16] and many other cases, a multitude of procedural protections were accorded juveniles in delinquency proceedings. In addition, procedural safeguards were extended to juveniles when charged with wrongdoing in a correctional setting (e.g., violating institutional rules while confined and violating conditions of parole while in the community).[17] With a few exceptions (e.g., the right to bail[18] and jury trial[19]), most of the procedural safeguards given adults—as defendants, prisoners, probationers, or parolees—are now also accorded to juveniles.[20]

Some reformers had hoped that by altering the way juvenile justice decisions were made, the abuses and unfairness related to the lack of procedural safeguards could be avoided without changing the system's underlying rehabilitative philosophy. The majority opinion in the *Gault* case asserted that increased procedural formality need not affect the pursuit of rehabilitation or individualized dispositions based on need.

---

13. *See generally* Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141 (1984).

14. Kent v. United States, 383 U.S. 541 (1966).

15. 387 U.S. 1.

16. *In re* Winship, 397 U.S. 358 (1970).

17. *See generally* Breed & Voss, *Procedural Due Process in the Discipline of Incarcerated Juveniles*, 5 PEPPERDINE L. REV. 641 (1978); Note, *Procedural Due Process for Confined Juveniles*, 2 NEW ENG. J. PRISON L. 173 (1976); Gilman, *Developments in Correctional Law*, 21 CRIME & DELINQ. 163 (1975); Note, *Post-Conviction Proceedings Under New York's Juvenile Offender Laws: A Due Process Critique*, 26 N.Y.L. REV. 773 (1981).

18. Schall v. Martin, 467 U.S. 253 (1984).

19. McKeiver v. Pennsylvania, 403 U.S. 528 (1970).

20. This article will not detail the growth of procedural protections for juveniles since the late 1960s because that topic has been discussed extensively in the literature. *See, e.g.*, Feld, *supra* note 13; Glen, *Juvenile Court Reform: Procedural Process and Substantive Stasis*, 1970 WIS. L. REV. 431; Glen, *Developments in Juvenile and Family Court Law*, 16 CRIME & DELINQ. 198 (1970).

> The observation of due process standards, intelligently and not ruthlessly administered, will not compel the state to abandon or displace any of the substantive benefits of the juvenile process . . . . The commendable principles relating to the processing and treatment of juveniles separately from adults are in no way involved or affected by the procedural issues . . . . Nothing will require that the conception of the kindly juvenile judge be replaced by its opposite.[21]

Interestingly, what this line of reasoning meant, in reality, was that it would be perfectly justifiable, as in the *Gault* case, to commit a fifteen-year-old juvenile to a state training school for a period of up to six years for an offense carrying a sixty-day jail sentence for adults, as long as the youth was provided with an attorney and a hearing.[22]

However, while not the intent of many proponents of greater due process for juveniles, procedural reforms did have a latent impact on the objectives of the juvenile justice system and its correctional interventions. With the advent of rules, generalizable standards, and requirements for procedurally correct decisions, attention began to be focused on *substantive* issues such as the equal and fair treatment of offenders rather than on individualized, situation-specific considerations. As a result, the offense, rather than the offender, came to be a critical factor in juvenile court dispositional decisionmaking.

### B. *Concern for Substantive Justice*

The implications of procedural reform for substantive changes in the philosophy of the juvenile justice system were welcomed by observers who believed changes more profound than procedural formalities should be made. The second wave of criticisms and reforms that emerged in the mid-1970s into the 1980s was specifically directed at changing the goals and structure of the system. Demands for overhauling the substantive purposes of the juvenile system came from those who rejected the very ideal of rehabilitation as well as from those who supported it as a laudatory goal, but recognized that it could not be achieved.

Critics taking the former position challenged the rehabilitative ideal because it focused almost exclusively on the problems of offenders and ignored the plight of crime victims and the community's need for protection. Van den Haag, a

21. *In re* Gault, 387 U.S. 1, 21-22, 27 (1967).
22. *Id.* at 4-9.

proponent of harsher policies towards youthful offenders, reflects this perspective by pointing out that "[t]he victim of a fifteen-year-old muggers [sic] is as much mugged as the victim of a twenty-year-old mugger, the victim of a fourteen-year-old murderer or rapist is as dead or as raped as the victim of an older one. The need for social defense or protection is the same."[23]

Prompted by concerns over rising crime rates and the perception that youths were committing more violent offenses, law-and-order advocates have been among the most vocal in complaining that the traditional juvenile sentencing process has been too lenient, particularly with serious offenders. To support their demands for substantive reforms, organized groups of law enforcement personnel and crime victims have pointed to instances where violent offenders have been released from institutional placement after being incarcerated for shorter periods of time than youths committing less serious crimes. Media sensationalism regarding juvenile crime—particularly the reporting of brutal or senseless violence by juvenile parolees or repeat offenders—contributed to the view that youth crime was a social problem warranting more stringent measures of control and coercion. To many, it seemed clear that policies and interventions associated with a treatment model had failed to rehabilitate youthful offenders or to provide adequate public protection.[24]

The other set of critics in the camp for substantive reforms based their challenges on the apparent inability of the juvenile justice system to fulfill its intended mission of rehabilitation.[25] Because "penny-pinching legislatures" have provided only for "inadequate facilities, low salaries [and] staff shortages,"[26] youths have not been accorded the services and programs they

23. E. VAN DEN HAAG, PUNISHING CRIMINALS 174 (1975). *Cf.* Boland & Wilson, *Age, Crime, and Punishment*, 51 PUB. INTEREST 22 (1978).

24. Although it is difficult to measure, it appears that juvenile crime did rise significantly between 1960 and 1975. Since 1975, however, the juvenile crime rate has leveled off or decreased. The perception of a growing juvenile crime rate since mid-1970s, therefore, is misplaced. *See generally* Ohlin, *The Future of Juvenile Justice Policy and Research*, 29 CRIME & DELINQ. 463 (1983); Galvin & Polk, *Juvenile Justice: Time for New Direction?*, 29 CRIME & DELINQ. 325 (1983).

25. *See, e.g.*, Lehman, *The Medical Model of Treatment*, 18 CRIME & DELINQ. 204 (1972); Clark, *Legal Policy and the Rehabilitative Reality*, 2 OHIO N.U.L. REV. 231 (1974); Sleeth, *A Child is a Child, Except When He's Not: California's New Approach to Disposition of Juvenile and Youthful Offenders*, 14 CAL. W.L. REV. 124 (1978).

26. A. COFFEY, JUVENILE JUSTICE AS A SYSTEM 129 (1974).

needed for successful rehabilitation. Moreover, some have suggested that informal procedures, contrary to original intent, may themselves have constituted a further obstacle to effective treatment. Rather, it is likely they engendered in the child "a sense of injustice provoked by seemingly all-powerful and challengeless exercise of authority by judges and probation officers."[27] Others have pointed out that juvenile dispositions mandating the youth's separation from the community and confinement in a secure facility are inherently punitive.[28] Many of these critics call for the abandonment of treatment as the primary objective underlying the system's philosophy and structure in favor of measures to promote just deserts, because they have accepted the position that "there is little reason to believe that any effective way to reduce recidivism through coercive rehabilitation has been found."[29]

These broad-based attacks encouraged a re-examination of the philosophy and structure of the traditional juvenile justice system. It became necessary to review the conflict of interests between the constitutional rights of juveniles accused of crime and the state's responsibility for protecting the community. Some critics have contended that these conflicting interests have most often been resolved at the expense of the youth, while others claim it has been society that has usually suffered. In either case, the impossibility of satisfactorily balancing these competing interests has become more apparent. As Kaufman has stated, "[I]n our single-minded determination to 'do good,' we often failed to take adequate cognizance of the limits of the law."[30]

### C. *Support for Punitive Policies Towards Youthful Offenders*

Reformers have advocated addressing the substantive inadequacies of the juvenile justice system through proposals for more punitive and less discretionary control measures. Their reform proposals have focused on holding youths accountable for their conduct, emphasizing incarceration as a primary crime control strategy, and limiting the options offi-

27. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 85 (1967).

28. *See* Empey, *Juvenile Justice Reform: Diversion, Due Process, and Deinstitutionalization*, in PRISONERS IN AMERICA 35-36 (L. Ohlin ed. 1973).

29. Schultz & Cohen, *Isolationism in Juvenile Court Jurisprudence*, in PURSUING JUSTICE FOR THE CHILD 39 (M. Rosenheim ed. 1976).

30. Kaufman, *Protecting the Rights of Minors: On Juvenile Autonomy and Limits of the Law*, 52 N.Y.U. L. REV. 1015, 1016 (1977).

cials have to sanction young offenders. Some policymakers saw that these interests could be accomplished by following one of two courses: (1) removing some classes of youthful offenders from the juvenile justice system in order to subject them to the more punitive criminal processes and sanctions of the adult system, or (2) making the juvenile system itself more punitive in form and function by changing its underlying philosophy, goals and dispositions. These two policy courses are, of course, not mutually exclusive.

Support for the first approach—removing youths from the juvenile system and handling them instead in the adult system—has been given by those who view it as a way of making the juvenile system available to a smaller but more deserving number of juvenile offenders. By limiting the jurisdiction of the juvenile court to younger juveniles or to juveniles who commit less serious crimes, some proponents of these measures hope to preserve the treatment and protection functions of the juvenile justice system. At the same time, they are responding to demands for more punitive handling of serious youthful offenders. Relevant distinctions could be maintained between the juvenile and adult systems by merely reclassifying the clientele each would handle so that those who appeared dangerous received punishment, and those who appeared needy and immature received treatment and protection. Revisions in the juvenile court's jurisdictional limits and standards for waiving juveniles have been advocated to promote the removal of youths from the juvenile court who seemed more like adults in appearance, behavior, and experience than like juveniles.[31]

Such support for transferring youths from the juvenile system into the adult system appears to be based in part on a desire to avoid draining the limited resources of the juvenile system on offenders who were "lost causes"—older, chronic offenders who had already received treatment and support services from the juvenile court, or serious and violent offenders who posed significant and persistent threats to community safety. Limiting the jurisdiction of the juvenile court has also been supported by those desiring to avoid having younger, less criminally sophisticated youths exposed to and adversely affected by older, more experienced youthful offenders.

---

31. *See, e.g.*, Wolfgang, *Abolish the Juvenile Court System*, 2 (10) CAL. LAW. 12 (1982); Feld, *Delinquent Careers and Criminal Policy: Just Deserts and the Waiver Decision*, 21 CRIMINOLOGY 195 (1983); Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471 (1987) [hereinafter Feld, *Legislative Changes*].

Extending the jurisdiction of the criminal court to encompass youths deemed ill-suited for the juvenile system has been an attractive strategy for some because it makes possible the preservation of the distinctive characteristics of the juvenile justice system as originally envisioned. However, the drawback to this strategy is that it makes the juvenile justice system unavailable to the very youths who may be most in need of its educational and counseling services if they are to avoid a life of imprisonment. The consequences of handling youths in the criminal system are discussed later.

The other approach to more punitive policies—changing the philosophy, goals, and sanctions of the juvenile system—has been advocated by those wishing to preserve the juvenile justice system as a separate system by making it more responsive to concerns of public safety, equal justice, and rationality in decision processes. Backers of this strategy have acknowledged conceptual as well as operational flaws in the original theory of *parens patriae* and the rhetoric of individualized justice. However, implicit in the support for reforming these ideals has been the continuing belief that youths are different from adults at some level. When the state assumes control over the youthful offender, it has special obligations that do not exist between the state and the adult offender. While young people may be subject to the same period and type of restraint as adults, how they are treated while under state custody—especially with respect to opportunities for education, vocational training, and therapeutic counseling—should be qualitatively different. The preservation of a separate system for juveniles, whatever its characteristics, is fundamental to this belief.

However, by altering some of the system's fundamental features, strategies to reform the juvenile justice system from within may unwittingly be moving the system closer to obsolescence. To the extent the new juvenile justice policies view the young offender as being morally and legally responsible, and state interventions are recognized as being no substitute for familial care or for the complex of relations and institutions in the community that socialize young people, the rationale for a special set of correctional programs and policies is lost. The consequence of the incongruence of these ideas with the justifications for having a separate system of justice for juvenile offenders will also be considered later.

Notwithstanding their incongruities and untoward effects, proposals to orient the philosophy and administration of the juvenile justice system around punishment and public protection have been supported by a diverse set of scholars,

lawmakers, and practitioners. The prestigious Joint Commission on Juvenile Standards of the Institute of Judicial Administration and the American Bar Association (IJA/ABA) proposed in 1980 that the principles of criminal law and procedure replace the rehabilitative model of juvenile justice.[32] The Joint Commission advocated that juvenile justice sanctions be offense-based rather than based on the needs of the offender and that determinate sentencing should replace the traditional indeterminate sentencing system. Moreover, the National Advisory Committee for Juvenile Justice and Delinquency Prevention in its *Standards for the Administration of Juvenile Justice* supported a move to have the offense, as opposed to the needs of the offender, form the basis of a system of juvenile court dispositions.[33]

To promote the shift toward an offense-based system of sanctions, reformers have proposed the adoption of what has been variously referred to as a justice, punishment, or accountability model for the juvenile system. Such a justice model provides guidelines and justifications for decisionmaking that are consistent with the legal and moral principles underlying the state's police powers and constitutional restraints on that power. With its emphasis on sanctions proportionate to the seriousness of the offense and the equal treatment of similarly situated offenders, the justice model has attracted support from lawmakers and lobbyists from all positions in the political spectrum.

For example, the justice model has been supported by some children's rights advocates because it recognizes a youth's right to be punished for the offense committed, rather than the need to be treated for what others perceive to be wrong with him.[34] One attraction of justice based on the offense rather than on the best interests of the child is that it is

32. *See, e.g.*, INSTITUTE OF JUDICIAL ADMINISTRATION/AMERICAN BAR ASSOCIATION JOINT COMMISSION ON JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO DISPOSITIONS 22-30 (1980). *Cf.* McCarthy, *Delinquency Dispositions Under the Juvenile Justice Standards: The Consequences of a Change of Rationale*, 52 N.Y.U. L. REV. 1093 (1977).

33. *See* THE NATIONAL ADVISORY COMMITTEE FOR JUVENILE JUSTICE AND DELINQUENCY PREVENTION, STANDARDS FOR THE ADMINISTRATION OF JUVENILE JUSTICE 337 (1980).

34. *See, e.g.*, Shepherd, Jr., *Challenging the Rehabilitative Justification for Indeterminate Sentencing in the Juvenile Justice System: The Right to Punishment*, 21 ST. LOUIS U.L.J. 12, 33-34 (1977). It should be noted, however, that other children's rights advocates have taken a different tact in upholding the traditional rehabilitative focus of juvenile correctional interventions. They have instead pushed for a constitutional right to treatment—a right that has

likely to prevent the disproportionate periods of incarceration permitted under a rehabilitation-oriented system. As Fox has noted, "punishment clearly implies limits, whereas treatment does not."[35] Under this approach, a youth would not be incarcerated longer than is justified by the nature of the delinquent conduct, and certainly no longer than an adult convicted of the same offense.

The justice model has also appealed to advocates of victims' rights and more restrictive crime control measures. Such a model increases the likelihood that a youthful offender will be subject to sanctions commensurate with the offense and the harm caused. Predicated on proportionality, an offense-based system of justice permits greater equality between the sanctions imposed on adults and those imposed on juveniles adjudicated for the same crime. A justice model promises to confront offenders with their wrongdoing, regardless of age, by requiring that they bear the consequences of their criminal behavior.

Proposals for changing the juvenile court's sentencing structure have accompanied the movement to re-orient the juvenile justice system's philosophy. These proposals have featured offense-based models of decisonmaking,[36] and sentencing guidelines have been advocated as a suitable way to deal with the problems of discretion and disparity created by the traditional system of indeterminate sentences and the broad decision making authority of judges and correctional personnel.

## III. SUBSTANTIVE REFORMS

### A. *Removing Youths From the Juvenile Justice System*

One strategy lawmakers have utilized more extensively in recent years to deal with serious, chronic, or violent juvenile offenders is to prosecute them as adults—i.e. to remove them from the juvenile justice system altogether. This process is generally known as waiver or transfer.

---

been recognized by some state and federal courts. *See, e.g.*, Morales v. Turman, 383 F.Supp. 53 (E.D. Tex. 1974).

35. FOX, *The Reform of Juvenile Justice: The Child's Right to Punishment*, 25 JUV. JUST. 2, 4 (1974).

36. *See e.g.*, Becker, *Washington State's New Juvenile Code: An Introduction*, 14 GONZ. L. REV. 289 (1979); Reich, *The Juvenile Justice Act of 1977: A Prosecutor's Perspective*, 14 GONZ. L. REV. 337 (1979).

### 1. Background on Waiver Procedures

Most of the early court statutes contained some provision for waiving jurisdiction.[37] Certain youths, described as "chronic," "serious," "violent," "sophisticated," "mature," or "persistent" were thought to be beyond the purview of the rehabilitative-oriented juvenile court. Early statutes gave the juvenile court absolute discretion to dismiss a delinquency petition and to transfer a youth to the criminal justice system.[38] Most statutes did not prescribe substantive criteria or procedures for the waiver process, thereby allowing waiver decisions to be made in an informal and subjective manner, giving unfettered discretion to the juvenile court.[39]

In 1966, the United States Supreme Court, in *Kent v. United States*,[40] struck down the arbitrary procedures implicit in the District of Columbia's waiver provision and held that a juvenile was entitled to a waiver hearing, representation by counsel, access to information upon which the waiver decision was based, and a statement of reasons justifying the waiver decision. In a non-binding memorandum attached to the opinion in *Kent*, the majority set forth several factors a juvenile court judge might consider in making a waiver decision. However, the Court has not struck down any waiver legislation containing such vague phrases as "amenability to treatment," "dangerousness," "protection of the public," "best interests of the public welfare," or the nature of the youth's "family, school and social history."

Over the past twenty years, approximately half of the state legislatures have amended their juvenile codes to simplify or expedite the waiver of juveniles to criminal court for trial as adults.[41] State legislatures have redefined criteria for the age limit of juvenile jurisdiction and changed the assignment of discretionary authority for determining the court before which certain types of juvenile cases will appear.

Removing a youth from juvenile court jurisdiction can be accomplished in one of three primary ways: judicial waiver, legislative waiver, and prosecutorial waiver. While most states continue to permit the judge to make the waiver decision, some

37. *See generally* Whitebread & Batey, *The Role of Waiver in Juvenile Court: Questions of Philosophy and Function*, in MAJOR ISSUES IN JUVENILE JUSTICE INFORMATION AND TRAINING: READINGS IN PUBLIC POLICY 207-26 (J. Hall, D. Hamparian, J. Pettibone & J. White eds. 1981) [hereinafter MAJOR ISSUES].

38. *See* Feld, *Legislative Changes*, note 31, at 478.

39. *Id.*

40. Kent v. United States, 383 U.S. 541 (1966).

41. *See* Feld, *Legislative Changes* note 31, at 504.

jurisdictions have changed their waiver procedures to vest authority for transfer in the hands of the legislature or the prosecutor. The differences in these approaches to reforming waiver policies and making the juvenile court unavailable to categories of youthful offenders are described below.

### 2. Judicial Waiver

In all but a few states, statutes empower a juvenile court judge to decide, with varying degrees of statutory guidance, whether to transfer certain juveniles charged with specified offenses to adult court for prosecution.[42] The judicial decision to waive a youth to criminal court recognizes that for certain offenses or offenders, juvenile justice system sanctions may, because of jurisdictional limitations, be insufficient to meet the needs of the public and the offender. Waiver statutes assume, moreover, that some youths are simply beyond rehabilitation, that is, unamenable to treatment in the juvenile justice system.

As Rudman and others have pointed out, waiver is itself a severe sanction, with potentially harsh consequences, including extended detention in jail, a protracted adjudicatory process, a felony conviction resulting in social and legal sanctions, and a lengthy sentence at a secure correctional institution.[43] Accordingly, the waiver decision does more than determine a judicial forum for an accused youth. It invokes a jurisprudential philosophy that governs the nature of the proceedings as well as the purpose and severity of the sanctions. It also raises the important issues of when a child is no longer a child and what factors, other than age, are relevant for removing some youths from juvenile court jurisdiction.

Waiver by the juvenile court judge remains the primary mechanism for referring a youth to criminal court. The judge must identify those juvenile offenders amenable to the rehabilitative efforts of the juvenile justice system and those whose behaviors require the punitive sanction of the criminal justice system. However, irrespective of the *Kent* memorandum and the descriptive criteria found in the majority of statutory provisions on judicial waiver, broad discretion still surrounds the judicial waiver decision.[44]

---

42. *Id.*

43. *See* Rudman, Hartstone, Fagan & Moore, *Violent Youth in Adult Court: Process and Punishment*, 32 CRIME & DELINQ. 75 (1986) [hereinafter Rudman, *Discretionary Waiver*].

44. *See generally* Wizner, *Discretionary Waiver of Juvenile Court Jurisdiction: An Invitation to Procedural Arbitrariness*, 3 CRIM. JUST. ETHICS 41 (1984).

### 3. Legislative Waiver

A newer approach to prosecuting juveniles as adults, and one that circumvents the juvenile court altogether, is legislative waiver, also known as excluded offense provisions. One strategy to accomplish the removal of offenders from the juvenile court is for the legislature simply to lower the age of criminal court jurisdiction. The other strategy, the more common one, is for the legislature to specify those offenses for which a juvenile may not be adjudicated in juvenile court.

New York's 1978 legislative change is one example of the latter type of legislative waiver. The Juvenile Offender Law provided that the criminal court is to have original jurisdiction in cases of thirteen, fourteen, and fifteen-year-olds charged with specified serious offenses.[45] The legislation also established a presumptive length of stay in secure confinement, although the periods of incarceration are not as long as those authorized for adults convicted of the same offense.

It is important to note that this form of waiver can be used in conjunction with traditional judicial waiver. For example, Georgia's legislative waiver provisions establish original criminal court jurisdiction for juveniles fifteen years of age and older charged with burglary and having three prior adjudications for burglary.[46] For other offenses, the juvenile court judge in Georgia retains jurisdiction to waive juveniles to criminal court. Other states have also combined legislative and judicial waiver. In a special legislative session in 1981, Vermont modified its waiver laws to require the criminal court to have original jurisdiction over fourteen and fifteen-year-olds who have been charged with specified crimes.[47] Moreover, Vermont's new law provides that children aged ten through thirteen may be prosecuted as adults.

Recent reforms in California's waiver procedures also combine traditional judicial discretion with a legislated presumption of unfitness established by age and offense. Youths sixteen years of age and older *may* be found by the juvenile court judge to be unamenable for juvenile court intervention

---

45. N.Y. PENAL LAW § 30.00(2) (McKinney 1987). For discussion see McGarrell, *Change in New York's Juvenile Corrections System*, 1 CRIM. JUST. POL'Y REV. 169 (1986); Woods, *New York's Juvenile Offender Law: An Overview and Analysis*, 9 FORDHAM URB. L.J. 1 (1980); Note, *Rehabilitation vs. Punishment: A Comparative Analysis of the Juvenile Justice Systems in Massachusetts and New York*, 21 SUFFOLK U.L. REV. 1091 (1987).

46. GA. CODE ANN. § 15-11-39.1 (1990).

47. *See generally* Note, *The Serious Young Offender Under Vermont's Juvenile Law: Beyond the Reach of Parens Patriae*, 8 VT. L. REV. 173 (1983).

based on the judge's consideration of enumerated facts.[48] These factors include the minor's delinquent history, previous attempts by the juvenile court to rehabilitate the minor, the circumstances and gravity of the offense charged, whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction, and the degree of criminal sophistication exhibited by the minor.

In addition, and as a result of a 1976 statutory revision made to expedite the transfer of older, serious youthful offenders, a *presumption* of unfitness favoring waiver was added to the California law.[49] Under this new section, youths sixteen and older charged with specified offenses are presumed to be unfit subjects for the juvenile system because of the charged offense and age. The list of offenses includes murder, plus various classifications of arson, rape and other sexual offenses, kidnap, assault, and drug-related crimes.[50] However, under this provision, a youth may rebut the presumption with evidence indicating she would "be amenable to the care, treatment, and training program available through the facilities of the juvenile court."[51]

### 4. Prosecutorial Waiver

Prosecutorial waiver (also known as concurrent jurisdiction or direct filing) is another approach to circumventing juvenile court jurisdiction. This strategy authorizes the prosecuting attorney to file either in juvenile court or directly in criminal court. Statutes permitting direct filing often provide some restrictions or guidelines, such as a combination of the alleged offense, age of the juvenile, and whether the youth has had prior adjudications in juvenile court.

Nebraska is one state that has historically used this method of prosecuting serious juvenile offenders in adult court. Nebraska's law provides that the county attorney (district attorney) has discretion to file in juvenile court or in the municipal or district (criminal) courts in three types of cases: a juvenile of any age alleged to have committed a felony, a juvenile sixteen or seventeen alleged to have committed a misdemeanor or infraction, or a juvenile of any age alleged to have committed a

48. *See* CAL. WELF. & INST. CODE § 707(a) (West 1984).

49. *See* Gadbois & Black, *1976 Amendments to the Juvenile Court Law: Adult Treatment of 16-17 Year-Old Offenders*, 9 U. WEST L.A. L. REV. 13, 22 (1977).

50. *See* CAL. WELF. & INST. CODE § 707(b) (West 1984).

51. CAL. WELF. & INST. CODE § 707(a) (West 1984).

traffic offense.[52] This statutory scheme, therefore, encompasses all serious juvenile criminality.

As with legislative waiver, some states combine both judicial waiver and direct prosecutorial filing. In 1967, for example, Colorado enacted a law permitting prosecutors to file directly on juveniles sixteen and seventeen years of age charged with an offense that, if committed by an adult, could result in a sentence of life imprisonment or death.[53] In 1973 the Colorado legislature broadened the direct filing provision to include youths over sixteen years of age charged with certain felonies and youths who, in the previous two years, had been adjudicated for a felony offense.

Florida passed a law in 1981 that permits the state's attorney to file a criminal complaint on sixteen and seventeen-year-olds when the public interest requires the consideration of adult sanctions.[54] This applies to felonies as well as to misdemeanors preceded by two delinquency adjudications, one of which must have been a felony. Also in 1981, Utah revised its waiver statutes. Current provisions retain judicial waiver for most cases but provide for direct criminal court filing for some offenses.[55]

It should be noted that both legislative and prosecutorial waiver statutes commonly permit the criminal court judge to send the juvenile offender back to the juvenile court for adjudication if the juvenile is deemed not to be a fit candidate for the criminal justice system. This process is typically called "reverse waiver."

### B. *Changes in the Juvenile Justice System's Philosophy and Goals*

By the end of the 1970s, lawmakers began to respond to calls for harsher measures against juvenile crime by altering the espoused purposes and administration of the juvenile court and youth correctional systems. As Feld has documented, in the past decade at least ten states have modified the purpose provisions of the juvenile court by de-emphasizing rehabilitation and introducing or stressing community protection and

52. *See* NEB. REV. STAT. § 43-274 (1988).

53. *See* COLO. REV. STAT. § 19-1-104(4)(c) (1986). For a discussion, see Note, *The Expanding Scope of Prosecutorial Discretion in Charging Juveniles As Adults: A Critical Look at* People v. Thorpe, 54 U. COLO. L. REV. 617, 618-21 (1983).

54. *See* FLA. STAT. § 39.09(2)(e) (1981). For a discussion, see Carter, *Chapter 39, The Florida Juvenile Justice Act: From Juvenile to Adult with the Stroke of a Pen*, 11 FLA. ST. U.L. REV. 921 (1984).

55. *See generally* Norman & Gillespie, *Changing Horses: Utah's Shift in Adjudicating Serious Juvenile Offenders*, 12 J. CONTEMP. L. 85 (1986).

punishment.[56] Two pre-eminent examples of this philosophical change are Washington and California.

In passing the Juvenile Justice Act of 1977,[57] Washington became the first state to enact a determinate sentencing statute for juvenile offenders. Mary Kay Becker, principal sponsor of the bill, said of the new statute:

> [T]he broad purposes of [the bill] should be fairly clear. In terms of the philosophical polarities that have characterized the juvenile court debate for more than a century, the new law moves away from the *parens patriae* doctrine of benevolent coercion, and closer to a more classical emphasis on justice. The law requires the court to deal more consistently with youngsters who commit offenses. The responsibility of providing service to youngsters whose behavior, while troublesome, is noncriminal, is assigned to the Department of Social and Health Services and the agencies with whom it may contact. The juvenile court is to view itself primarily as an instrument of justice rather than as a provider of services.[58]

This dramatic philosophical change is also demonstrated in the specific objectives of the new legislation; which included (1) making "the juvenile offender accountable for his or her criminal behavior," and (2) providing "punishment commensurate with the age, crime, and criminal history of the juvenile offender."[59] The requirement of commensurate punishment creates the foundation for a determinate sentencing system for juveniles in Washington, which we shall discuss below.

The California legislature has also made a number of significant changes in the codes pertaining to the philosophy and operation of the juvenile court. Statutory revisions enacted in the past ten years have made accountability, victims' rights, and public safety high priorities of the juvenile justice system. The current statement of purpose for the juvenile court reads in part:

> . . . The purpose of the [Arnold-Kennick Juvenile Court Law] is to provide for the protection and safety of the public and each minor under the jurisdiction of the juvenile court . . . . Minors under the jurisdiction of the juvenile court as a consequence of delinquent conduct shall,

56. *See* Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference it Makes*, 68 B.U.L. REV. 821, 844 (1988).

57. WASH. REV. CODE § 13.40.010 (West Supp. 1990).

58. Becker, *supra* note 36, at 308.

59. WASH. REV. CODE, § 13.40.010(2)(c)-(d) (West Supp. 1990).

> in conformity with the interests of public safety and protection, receive care, treatment and guidance which is consistent with their best interest, which holds them accountable for their behavior, and which is appropriate for their circumstances. This guidance may include punishment . . . . As used in this chapter, "punishment" means the imposition of sanctions which include the following:
>
> (1) Payment of a fine by the minor.
> (2) Rendering of compulsory service without compensation performed for the benefit of the community by the minor.
> (3) Limitations on the minor's liberty imposed as a condition of probation or parole.
> (4) Commitment of the minor to a local detention or treatment facility, such as a juvenile hall, camp, or ranch.
> (5) Commitment of the minor to the Department of the Youth Authority. "Punishment," for the purposes of this chapter, does not include retribution.[60]

The California legislature has also specified the factors a juvenile court judge is to consider when choosing an appropriate disposition for the youthful offender. Included in the provision on selecting a disposition are the minor's age, the circumstances and gravity of the offense, and the minor's previous delinquent history.[61] While these factors are only broadly stated and include no guidance as to how they are to be weighted or assessed, they draw the judge's attention to matters related to the youth's criminal conduct and not to her needs.

In addition, the administrative policies instituted by correctional officials in the California Youth Authority (CYA) system have also begun to focus on the goals of accountability and public protection. In the comprehensive statement of mission and directions issued by the Department of the Youth Authority in 1983, the Director declared that "the most effective way to protect the public is to ensure that offenders are held accountable for their antisocial behavior."[62] According to this policy document, accountability "refers to the ward accepting

60. CAL. WELF. & INST. CODE § 202 (West Supp. 1989).

61. *Id.*, at § 725.5.

62. DEPARTMENT OF THE YOUTH AUTHORITY, MISSION STATEMENT, PREMISES, EXPANDED DIRECTIONAL STATEMENTS 5 (1983).

*full responsibility* for his or her own behavior, including the commitment offense and behavior while in the institution and on parole."[63] The Department has construed its charge to hold offenders responsible for their delinquent conduct as a mandate to have youths address the effects of their behavior on victims.

> The Youth Authority embraces victim assistance as an essential means of making government more responsive and sensitive to the consequences of criminal behavior. The Department will work on . . . [delivering] increased services to victims . . . . These services will include restitution, public service work projects, and resource sharing efforts which emphasize the offender's accountability for his offense . . . . Benefits of [these efforts] include . . . the enhancement of public protection, assistance in alleviating the loss and suffering of the victims of crime, increases in wards' sense of responsibility for past acts, and promotion of values which help youthful offenders become law-abiding citizens.[64]

In addition, in the California youth correctional system, the Youthful Offender Parole Board (YOPB) is responsible for setting the specific term of confinement to be served by CYA wards within legislatively and judicially prescribed maximas. Since the early 1980s, the YOPB has made holding youthful offenders accountable its top priority and the major factor in decisions concerning release.

### C. *Reforms in the Juvenile Justice System's Dispositional Structure*

Several states have revised the internal structure of their juvenile justice systems, particularly commitment and release decisionmaking, to be compatible with the philosophical changes mentioned earlier. To re-orient the administration of sanctions within the juvenile system, policymakers have followed two major strategies: they have instituted determinate sentencing or sentencing guidelines, and they have imposed mandatory sanctions, such as a minimum period of confinement or restitution on youths adjudicated for specified offenses.

---

63. *Id.* (emphasis added).
64. *Id.* at 17.

### 1. Background on Determinate Sentencing

A careful review of the scholarly literature reveals that the term "determinate sentencing" has no precise or uniform definition either in law or in common usage.[65] For some it has simply been used interchangeably with "flat-time sentencing," which means that a trial court judge metes out a specific sentence which cannot be modified by a parole board or other correctional authority. To others, it has meant eliminating the authority given to a parole board or a juvenile corrections agency for discretionary releases and replacing it with legislatively derived sentencing standards which are to be imposed by the juvenile court.

However, von Hirsch and Hanrahan have suggested a more encompassing definition of determinate sentencing that includes the following elements: (a) a presumptive sentence (or narrow range), (b) normally based on the commitment offense (as opposed to the needs of the offender), and (c) set either at the time of sentencing or shortly after the penalty has been imposed.[66] Once the specific adjudication offense has been assessed, it is possible to determine fairly accurately the length of the offender's stay in an institution. Other factors can be added to the sentencing formula besides the commitment offense, such as prior offense history and age. But based on this definition, it is possible for a parole board or a juvenile correctional agency to administer a determinate sentencing system for juveniles. Moreover, the specific structure of a determinate sentencing scheme can use either a specific presumptive sentence or a narrow range.

As mentioned in the previous discussion of philosophical changes, the first state in the country to enact a determinate sentencing statute for juveniles was Washington in 1977. Comprehensive sentencing standards, the result of a cooperative effort between the state legislature and a sentencing commission, make up the core of Washington's determinate sentencing system.[67] Initially, the legislature established broad offense-related dispositional and durational standards based on

---

65. *See generally* Goodstein, Kramer, & Nuss, *Defining Determinacy: Components of the Sentencing Process Ensuring Equity and Release Certainty*, 1 JUST. Q. 47 (1984); Forst, Fisher & Coates, *Indeterminate and Determinate Sentencing of Juvenile Delinquents: A National Survey of Approaches to Commitment and Release Decision-Making*, 36(2) JUV. & FAM. CT. J. 1 (1985); Dershowitz, *Indeterminate Confinements: Letting the Therapy Fit the Harm*, 123 U. PA. L. REV. 297 (1974).

66. *See* von Hirsch & Hanrahan, *Determinate Penalty Systems in America*, 27 CRIME & DELINQ. 289, 294 (1981).

67. *See generally* Becker, *supra* note 36.

the youth's commitment offense, criminal history and age. After setting forth the appropriate standards to be followed in general terms, the legislature then created the Juvenile Disposition Standards Commission to develop specific guidelines for judges.

The Commission identified various factors in the offender's record associated with the commitment offense and criminal history that were to be assigned particular numerical scores. Based on a youth's adjudicated offense and history, she would achieve a specific point total. The standards relate the various score totals to specific mandatory dispositions and durational periods of probation, community services, or incarceration in a state training school. Prior to sentencing, court personnel calculate the youth's points. The juvenile court judge then imposes the "presumptive sentence" indicated in the guidelines. For sanctions involving incarceration, the guidelines provide a relatively narrow range for the term of confinement for each point total. For example, if an offender scores between 250 and 299 points, the judge commits the youth to the juvenile training school for a period of fifty-two to sixty-five weeks. Within this durational range, the correctional authorities set the actual length of stay and release date.

It should be noted that the Washington legislature provided an "escape clause" for the juvenile court judge in the application of the sentencing guidelines. There is a provision in the law which authorizes the juvenile court judge to sentence the youth outside the appropriate guidelines.[68] If the court considers aggravating and mitigating circumstances and finds that sentencing the youth within the guideline ranges would cause a "manifest injustice"[69] to the youth or to society, it may sentence the youth outside the established guidelines. When the judge invokes the manifest injustice clause, she must set forth written reasons, and the youth has a right to appeal the dispositional order.

California has adopted a different strategy in moving toward determinacy in sentencing juvenile offenders. Prompted by the California Supreme Court's ruling in *People v. Olivas*[70] to extend the equal protection of the law to the term of confinement served by youthful offenders committed to the California Youth Authority, the legislature modified the indeterminate sentencing law applicable to juveniles. As part of the

68. *See* WASH. REV. CODE § 13.40.160 (West Supp. 1990).
69. *Id.* at 13.40.160(1).
70. People v. Olivas, 17 Cal.3d 236, 551 P.2d 375 (1976).

major reform package adopted in 1976 which affected several aspects of the juvenile justice system, including the transfer provisions described above, legislators enacted that

> In any case in which the minor is removed from the physical custody of his parent or guardian as the result of an order of wardship . . . [based on sustaining the charge of a criminal offense], the order shall specify that the minor may not be held in physical confinement for a period in excess of the maximum term of imprisonment which could be imposed upon an adult convicted of the offense or offenses which brought or continued the minor under the jurisdiction of the juvenile court.[71]

When ordering the commitment of a juvenile to the California Youth Authority, the juvenile court judge must now specify the offense or offenses for which the youth is being confined, and the maximum available confinement time permitted for the offense. The maximum term relates to California's determinate sentencing law for adults, which specifies a lower, middle, and upper term for each felony. In calculating the time to be served in confinement for multiple offenses, juvenile court judges must follow the rules on setting consecutive and current terms as specified in the California Penal Code and the Rules of Court for adults.[72]

While the current statutory framework establishes maximum confinement terms for juveniles based on sentences set forth in the Penal Code, the Youthful Offender Parole Board (YOPB) has the discretion to order release prior to the expiration of this term.[73] Out of concern for equality and proportionality, the legislature applied the maximums to provide youths the protection of limits on confinement associated with the offense rather than treatment needs. Lawmakers expect that the YOPB will release most wards before the end of the maximum term.

While the legislature was fashioning these new parameters on sentencing for both adults and juveniles, the YOPB began to develop an elaborate set of administrative policies to govern release decisionmaking and to promote the rational exercise of its lawful discretion on this matter. These policies were formally organized into a set of parole release standards referred to as Parole Consideration Date Guidelines. As a policy state-

71. CAL. WELF. & INST. CODE § 726(c) (West 1984).

72. *See generally* R. HOLLER, THE DETERMINATE SENTENCE LAW IN JUVENILE COURT (1978).

73. *See* CAL. WELF. & INST. CODE § 1766(a),(b) (West 1984).

ment, the guidelines were created to balance concerns for public safety, fair treatment of the offender, and justice to the victim.

The guidelines are offense-based and contain several distinct features. They constitute a form of determinacy in sentencing by associating each commitment offense with a presumptive term of confinement. All crimes are placed into one of seven categories, each of which is assigned a presumptive parole consideration date which is proportionate to the seriousness of the offenses listed in the category. The guidelines specify the composition of the hearing panel authorized to set release dates and relate hearing panels to offense categories. Generally speaking, the more serious the offense and the higher the offense category (with Category 1 including the most serious offenses such as murder, kidnap and rape, and Category 7 the least serious such as technical violations of parole conditions), the larger the number of hearing officers who must participate in determining the release date.

Once a ward has been placed at a Youth Authority reception clinic and has been evaluated through a series of diagnostic tests, clinic staff schedule the youth for an initial appearance before a Board panel. The tentative designation made by staff for the ward's offense category and hearing panel size is then confirmed or altered by the hearing officers at this initial appearance. The hearing panel also determines the parole consideration date, at which time the youth can reasonably expect to be released. Once set at this first hearing, the parole consideration date can be modified at the youth's annual review or intermediary progress review hearings. At such subsequent hearings, the Board panel may consider a variety of factors to justify shortening or extending the term. These factors include how the ward "has dealt with her commitment offense," her attitude, her behavior while confined, her participation in programs ordered by the parole board, and her willingness to acknowledge responsibility for her crime. If there are no modifications, the youth is released on her parole consideration date, which may have been set months or years before.

Other examples of determinate sentencing schemes within the juvenile court appear more draconian. For example, in 1987 the Texas legislature passed an act aimed at thirteen and fourteen-year-old serious juvenile offenders.[74] This law provides that juveniles who have been adjudicated for one of six

74. *See generally* Dawson, *The Third Justice System: The New Juvenile-*

enumerated crimes may receive a determinate sentence as long as thirty years in confinement. The youth is to serve her sentence in the juvenile correctional system until the age of eighteen, at which time the offender may be transferred to the adult correctional system to serve out the remainder of her sentence.

### 2. Mandatory Minimum Sentencing Statutes

Some states have passed what amount to mandatory sentencing laws for serious delinquents, often referred to as "serious delinquent statutes." These laws mandate that a subset of delinquents (usually statutorily labeled as "serious," "violent," "repeat," or "habitual") be adjudicated and committed in a specific manner different from other committed delinquents. These youths are subject to adjudication in juvenile court (as opposed to waiver to adult court), but they receive commitments which may vary significantly from the type given other adjudicated delinquents.

One example of this strategy is New York's Designated Felony Law, which was part of the Juvenile Justice Reform of 1976.[75] This law provided that violent juvenile offenders remain in juvenile court (Family Court), but required harsher penalties for fourteen and fifteen-year-olds adjudicated for specified crimes. Another example of mandatory minimum sentencing can be found in Illinois' Juvenile Law. In 1984, the Illinois legislature enacted the Habitual Juvenile Offender Act, which provides that habitual juvenile offenders be subject to mandatory confinement in a youth correctional facility until the age of twenty-one.[76]

## IV. Consequences of the Crack Down

Many of the reforms discussed above have been implemented so recently that it has not been possible to evaluate them thoroughly. Moreover, the studies that have been conducted often suffer from methodological problems that make valid comparisons difficult. Nevertheless, the move to crack

---

*Criminal System of Determinate Sentencing for the Youthful Violent Offender in Texas*, 19 St. Mary's L.J. 943 (1988).

75. For a discussion of the Designated Felony Law, see Woods, *supra* note 45.

76. Ill. Rev. Stat. ch. 37, para. 705-12 (1983 & Supp. 1984) (The Habitual Juvenile Defender Act was originally part of the Juvenile Court Act of 1965. This Act was replaced with the Juvenile Court Act of 1987, P.A. 85-601, so that former paragraph 705-12 is now paragraph 805-35). For a discussion, see Note, *Mandatory Sentencing for Habitual Juvenile Offenders: People v. J.A.*, 34 De Paul L. Rev. 1089 (1985).

down on serious juvenile offenders appears to be having significant consequences—for the youths subject to harsher sanctions as well as for the youth correctional system as a whole. This discussion considers, first, the effects of reforms in waiver laws, and then some of the consequences of reforms making the juvenile justice system more punitive.

### A. *Waiver*

Revisions in waiver statutes have had somewhat mixed results. A couple of studies have shown that juveniles prosecuted as adults are treated more leniently than they would have been if they had remained in juvenile court. Most juvenile offenders considered for waiver have prior delinquency adjudications and are viewed as the most serious and dangerous offenders coming before a juvenile court judge. However, when these youths are waived to criminal court, they appear before a judge for the first time in an adult judicial setting. Compared to hardened adult criminal, these juveniles are perceived as relatively minor offenders. As a result, the criminal justice system in some jurisdictions appears to treat transferred juvenile offenders relatively benignly.[77] This phenomenon has been called the "leniency gap" for juvenile offenders in criminal court.[78]

On the other hand, most studies suggest that juvenile offenders waived to criminal court face much harsher sanctions than they would have received if they had been adjudicated in juvenile court. It is important to emphasize that the term "sanctions" in this article is not limited simply to case disposition in court. Sanctions also include the range of attendant consequences of criminal prosecution from pretrial detention to discharge from parole.

In one of the more comprehensive and recent studies of the consequences of waiver, Rudman and his associates conducted a study of 177 youths considered for transfer in four cities.[79] A comparison was made between those juveniles waived to criminal court and those retained in juvenile court. The researchers found that those youths waived to criminal court consistently fared less well than comparable youths adjudicated in juvenile court. For example, the Rudman study

77. *See, e.g.*, Roysher & Edelman, *Treating Juveniles as Adults in New York: What Does It Mean and How Does It Work?* in MAJOR ISSUES, *supra* note 37, at 265.

78. Rudman, *Discretionary Waiver*, *supra* note 43, at 78.

79. *Id.*

found that on the average it takes 2.5 times longer (246 compared to 98 days) for a youth to be waived, convicted and sentenced in criminal court than to be considered for transfer (but retained), adjudicated and disposed in juvenile court. In one site the time differential was over four times longer in criminal court. This delay has serious implications because the longer the process takes, the greater the delay in the delivery of services for convicted youths.

The Rudman study findings also challenge the idea of a "leniency gap" for youths convicted and sentenced in criminal court. The dispositions meted out by the criminal court were consistently more punitive than the dispositions given by juvenile court judges. First, a higher proportion of youths convicted in criminal court received some type of incarceration (prison or jail) than comparable youths sentenced in juvenile court (90% compared to 77%). Secondly, the length of the sentence for those incarcerated was approximately five times longer for youths convicted in criminal court.

Bilchik and Thomas conducted a recent study of the effects of prosecuting juveniles in the Miami, Florida criminal courts.[80] Although the comparative aspects of the study are problematic and the findings mixed, the authors found that the average sentence for juveniles convicted and sentenced to confinement by the criminal court was approximately four years. This average sentence can hardly be considered draconian; however, it is in all probability longer than the term of confinement these youths would have faced in the juvenile justice system.[81]

Moreover, an evaluation of the effects of Utah's 1981 waiver revisions found that under the new legislation both the conviction rate and the severity of sentence increased significantly compared to the data on waiver covering a 13-year-period before the revisions.[82] And in a study of juveniles pros-

80. *See* Thomas & Bilchik, *Prosecuting Juveniles in Criminal Courts: A Legal and Empirical Analysis*, 76 J. CRIM. L. & CRIMINOLOGY 439 (1985). *Cf.* Bishop, Frazier & Henretta, *Prosecutorial Waiver: Case Study of a Questionable Reform*, 35 CRIME & DELINQ. 179 (1989).

81. Current data on length of institutional stay at training schools in Florida are sketchy. According to one comparative study, the average length of institutional stay in Florida's training schools in recent years for all offenses has been between five and six months. This time period is considerably less than the average of four years in prison for waived youths. The five to six month figure, however, is for all offense categories; data were not available for the serious offenses separately. *See* DEPARTMENT OF THE YOUTH AUTHORITY, POPULATION MANAGEMENT AND FACILITIES MASTER PLAN, 1986-1991 A12 (1983).

82. *See* Norman & Gillespie, *supra* note 55, at 97.

ecuted in Philadelphia's criminal court and a comparable sample adjudicated in juvenile court, Eigen concluded that "[j]uveniles in adult court are in for hard times."[83]

The correctional experiences of juveniles prosecuted in criminal court have also begun to be studied. For example, Forst, Fagan and Vivona found that the conditions of imprisonment were much harsher for juvenile offenders serving time in a state prison when measured against a comparable group of youths who served their incarceration in a juvenile correctional institution (training school).[84] In this study, interviews were conducted with a sample of youths who had been waived to criminal court and subsequently sentenced to state prison and a sample of comparable juvenile offenders who had been retained in juvenile court and committed to a training school. Interviews took place approximately two years after placement in the respective institutions.

The study found that the correctional experiences for juveniles in prison were consistently less helpful and more punitive. Specifically, youths in prison reported less staff assistance in helping them to control their violent behavior, improve their interpersonal relations, achieve personal goals, and prepare them with job skills for their return to the community. Staff in prison were also reported as providing less help in getting the youths acquainted with institutional rules and procedures, encouraging program participation, providing counseling, and securing services needed by the youth inmates. Additionally, the study found that juveniles in prison were subjected to more personal victimization by other prisoners (and by staff) than the comparable sample in training schools.

Other studies have also shown differences in the ways juveniles cope in training schools and in prison. One study, for example, indicated that youths became more violent as part of their adjustment to the violence that surrounds them in prison.[85] Comparable youths in training schools did not face

83. Eigen, *The Determinants and Impact of Jurisdictional Transfer in Philadelphia*, in MAJOR ISSUES, *supra* note 37, at 333.

84. *See* Forst, Fagan & Vivona, *Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy*, 40(1) JUV. & FAM. CT. J. 1 (1989) [hereinafter Forst, *Youth in Prisons*]. *See also* MacShane & Williams, *The Prison Adjustment of Juvenile Offenders*, 35 CRIME & DELINQ. 254 (1989).

85. *See* Eisikovits & Baizerman, *"Doin' Time": Violent Youth in a Juvenile Facility and in an Adult Prison*, 6 J. OFFENDER COUNSELING, SERVICES & REHABILITATION 5 (1983).

the same problems of violence. They selected different, less violent, modes of adaptation.

### B. *Determinate Sentencing*

The data are also sketchy concerning the effects of sentencing revisions within the juvenile justice system. However, existing evidence suggests that, at least in some jurisdictions, revisions in the juvenile court and correctional system have resulted in moving the system in the intended direction of greater punitiveness.

The effects of the Washington revisions are inconclusive, due primarily to the lack of long-term follow-up studies, but some findings are noteworthy. Schneider and Schram found that admissions to training schools and the average daily population of training schools initially decreased with the implementation of the determinate sentencing law.[86] However, not long after, admissions reached or exceeded the levels prior to the reform. When dispositions were classified by general offense category, marked changes were observed in the severity of sanctions juvenile court judges imposed under the new sentencing guidelines. Prior to the determinate sentencing law, 38% of the adjudicated violent offenders were committed to a state facility; after the reforms, this number rose to 92%. A similar trend was noticed for serious or chronic offenders: 60% were committed to a state facility before the reform, and 87% after.

Evidence of a punitive orientation appeared with non-violent offenses as well. In a related research project, Schneider studied the processing and disposition of alcohol and drug offenders before and after the Washington reforms. She found that both drug and alcohol offenders received harsher sanctions after the move to the "justice" model than they did under the rehabilitation model.[87]

California provides evidence of the most extreme punitive consequences of juvenile justice reform. One overall evaluation of the juvenile justice system showed that the juvenile courts and the criminal courts are much more alike than the statutory language would indicate.[88] Judges in both the juve-

86. *See* Schneider & Schram, *The Washington State Juvenile Justice System Reform: A Review of Findings*, 1 CRIM. JUST. POL'Y REV. 211 (1986).

87. *See* Schneider, *A Comparative Analysis of Juvenile Court Responses to Drug and Alcohol Offenses*, 34 CRIME & DELINQ. 103 (1988).

88. *See generally* Greenwood, Lipson, Abrahamse & Zimring, YOUTH CRIME AND JUVENILE JUSTICE IN CALIFORNIA (1983).

nile court and criminal courts look primarily at the present offense and prior record in determining disposition. The study concluded:

> The evidence suggests that the juvenile justice system is becoming increasingly punitive, particularly for the more serious offenders. Between 1978 and 1981 the number of juveniles placed in secure county facilities jumped by 23% while CYA placements increased by more than 10%. All of this is occurring at the same time that arrest rates for most crime categories are either leveling off or declining.[89]

In recent years, more punitive statutory and administrative policies for youthful offenders and political pressure to hold juveniles accountable have created a perverse situation for the young person sent to the California Department of the Youth Authority. By virtue of her status as a youth and her amenability to efforts at reform,[90] the delinquent minor is committed to the Youth Authority (YA). Yet, once there, she is told she will be held fully responsible for her behavior and is liable for the maximum term of confinement applicable to adults convicted of the same offense. Indeed, as a result of the operation of the Youthful Offender Parole Board's release guidelines, youthful offenders in California are in some respects held more responsible for their wrongdoing than adults who commit the same crime.

Statistics on lengths of stay in 1987 indicated that YA wards on average served *longer* terms of confinement than adults sentenced to prison for the same offense. In a comparison with inmates of the California Department of Corrections (CDC) for fourteen categories of serious felony offenses, YA Department officials found that YA wards served 28.5 months of confinement overall while CDC prisoners served only 23.6 months. Specifically, in eleven out of the fourteen offenses, YA wards served as much or more time as their adult inmate counterparts. Only in the category of murder was there a notable difference in the direction of longer terms of confinement for adults sentenced to prison.[91]

---

89. *Id.* at 151.

90. By law, acceptance of a commitment from the juvenile court by the Youth Authority is predicated on a finding that the youth would be amenable to the treatment and training efforts of the Department. *See* CAL. WELF. & INST. CODE, §§ 707(a), 707(b), 707.2, 734, 1731.5(b) (West 1984).

91. The statistics for these comparisons included:

Recent changes in the Youthful Offender Parole Board's policies on release and its use of discretion to modify terms of confinement reflect greater reliance on incarceration as the method for holding youthful offenders accountable. Since the parole board adopted the Parole Consideration Date Guidelines, it has lengthened the presumptive terms for several of the offense categories. Originally viewed as the maximum average time wards would serve, the presumptive dates set forth in the guidelines for each category are now treated by board members as the minimum term wards are to serve for their commitment offenses. Moreover, in exercising their authority to deviate from the presumptive terms and to modify the terms once a ward has begun to serve her time, hearing officers in recent years have consistently used their discretion to impose an upward rather than a downward deviation from the presumptive terms. To the extent rehabilitation has played a role in the YOPB's release decisionmaking, it has been in the direction of extending a ward's length of stay in order to have the youth participate in another program. At the same time, many of the specialized programs offered in YA facilities have become increasingly unavailable to youths because of inadequate resources and bedspace to accommodate the growing number of wards being ordered into the programs. Yet, failure to enroll in a Board-ordered program results in an *extension* of a ward's parole consideration date.

### C. *Other Consequences*

Two other consequences are worthy of brief mention. First, the crack down on juvenile crime has substantially affected the number of juveniles placed in state training

| | LENGTH OF STAY | |
|---|---|---|
| | CYA WARDS | CDC INMATES |
| Manslaughter | 45.3 months | 38.3 months |
| Burglary | 26.5 months | 22.7 months |
| Theft | 24.1 months | 16.6 months |
| Drugs | 23.5 months | 18.1 months |

For first and second degree murder, CDC inmates served 167.7 and 103.2 months respectively, while CYA wards served 70.9 and 66.7 months. *See* INFORMATION SYSTEMS, DEPARTMENT OF THE YOUTH AUTHORITY, MEMORANDUM TO YOUTH AND ADULT CORRECTIONAL AGENCY (Aug. 3, 1988) (unpublished memorandum). A prior study in 1983 on relative lengths of stay served by YA wards and CDC inmates indicated that youths were confined for shorter periods than adults. *See* CALIFORNIA JUVENILE COURT LAW REVISION COMMISSION, REPORT TO THE LEGISLATURE 7, 24 (1984).

schools. *Children in Custody* reports that in 1987 there were more children in state juvenile facilities than at any time since that survey started in 1971.[92] Moreover, the rate per 100,000 of juveniles in custody increased from 185 in 1985 to 208 in 1987. This increase, it is important to note, was not due to an increase in the juvenile population which in fact is declining. Another noteworthy fact is that although there has been an overall increase in the number of juveniles in training schools in the country, there has actually been an eight percent decrease in the number held for serious and violent offenses.[93] That seeming anomaly can be accounted for by two facts: first, the juvenile courts are using incarceration with increasing frequency for less serious juvenile offenders, and second, more serious offenders are being waived to criminal court. As Krisberg has noted, "[t]here are no current national statistics on the extent of these transfers; however, the number of persons under eighteen admitted to adult prisons increased from 1,445 in 1981 to nearly 4,000 in 1983."[94]

Again, California presents the extreme example of the impact of the get-tough philosophy on a state's juvenile correctional system. The tougher policies of the YOPB have caused the overall length of stay for YA wards to climb steadily since 1978. Increased terms of confinement have had dramatic impacts on the size of the institutionalized population, demands for programs, resources, and staff.[95] In 1979, the Youth Authority had an institutionalized population of 4,955 wards with an average length of stay 11.6 months. By 1989, that population had increased to 8,500 wards with an average length of stay of 25.4 months. For every month the Board has increased the average length of stay for YA wards, there has been an increase in the incarcerated population of nearly 500 wards, or the equivalent of an entire institution.[96]

---

92. *See* OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, CHILDREN IN CUSTODY 1 (1988) [hereinafter CHILDREN IN CUSTODY].

93. *Id.* at 3.

94. Krisberg, *Violent Juvenile Offenders: The Treatment of Violent Juvenile Offenders*, 11(1) NEWSLETTER, Division of Child, Youth and Family Services, American Psychological Association, Division 37 1 (1988).

95. Commitment rates have remained remarkably stable for the Youth Authority in recent years, so the increase in population is due to the parole board's release decisions. *See generally* THE CALIFORNIA LEGISLATURE'S BLUE RIBBON COMMISSION ON INMATE POPULATION MANAGEMENT, FINAL REPORT (1990) [hereinafter BLUE RIBBON COMMISSION]; Department of the Youth Authority, SELECTED STATISTICS ON THE CALIFORNIA CRIMINAL JUSTICE SYSTEM 1980 THROUGH 1986 (1988).

96. *See* CALIFORNIA SENATE OFFICE OF RESEARCH, OVERCROWDING IN

Youth Authority facilities have not kept pace with the numbers; the current population is being housed in facilities designed to hold 6,400 wards. Studies have documented some of the deleterious conditions that have resulted from operating the Youth Authority at 141% capacity. Crowding has reduced administrative staff flexibility in program planning and placement so that incompatible wards are housed together because of bedspace constraints.[97] Moreover, assaults have increased in YA facilities during the past ten years as crowding has worsened. Statistics indicate the assault rate nearly doubled from 12.8 per 100 Average Daily Population (ADP) in 1978 to 24.3 per 100 in 1986.[98] In addition, the number of grievances filed by wards and the number of disciplinary actions taken by staff have increased as a result of crowding.[99]

While the Department's own research has shown that smaller, more highly staffed units are associated with positive, nonviolent, and nondelinquent social relations[100] (behavior that parole board members ostensibly look for when considering a ward's "readiness" for release), it has been unable to provide the environment to promote this therapeutic milieu. Moreover, as the institutional population size has increased, YA staff time has become devoted to managing violence in the institutions and to warehousing wards. The emphasis in the allocation of resources has shifted from traditional programs to hardware for security and workers' compensation due to stress-related disabilities. This reliance on institutionalization in California has led to the highest juvenile custody rate of any state in the country.[101] California's juvenile custody rate of 498 per 100,000 is over twice the national average of 208.

Aside from increases in institutional population, the second issue of interest is the effect of the get-tough ideology on recidivism. Unfortunately, good recidivism studies are noticeably absent in the literature, particularly as they relate to a comparison of approaches to juvenile justice, i.e., studies of punitive- versus rehabilitative-oriented systems, or pre-post

---

THE CALIFORNIA YOUTH AUTHORITY: AN ASSESSMENT OF CASES AND EFFECTS X (1982) [hereinafter OVERCROWDING].

97. *See id.* at XIV.

98. *See* BLUE RIBBON COMMISSION, *supra* note 95 at 38.

99. OVERCROWDING, *supra* note 96 at 81-83.

100. *See id. See also* C. MCEWEN, DESIGNING CORRECTIONAL ORGANIZATIONS FOR YOUTHS: DILEMMAS OF SUBCULTURAL DEVELOPMENT 90 (1978); Ray and Wandersman, *The Impact of Density in a Juvenile Correctional Institution: Research, Recommendations, and Policy Implications*, 4 EVALUATION & PROGRAM PLANNING 185, 189-90 (1981).

101. *See* CHILDREN IN CUSTODY, *supra* note 92, at 6.

studies of major statutory reforms. Only one good study exists in this vein. Schneider provides data comparing the recidivism rates before and after the juvenile justice reforms in Washington state.[102] In essence, she found that there was no difference in recidivism after the change to a "justice" model.

While correctional officials in California have used longer terms of incarceration both to hold youthful offenders accountable and to offer greater security to the public, recidivism rates do not suggest that offenders are more law-abiding as a result of these efforts. The CYA's recidivism rate increased from 44.5% in 1978 to 58.4% by 1985.[103] Additional carefully constructed recidivism studies should be conducted in the future to evaluate more thoroughly these juvenile justice reforms.

## V. IMPLICATIONS

The preceding description paints a picture of a juvenile justice system that is radically different from the one conceived and constructed by its founders. Gone are the informality, the paternalism, and the pretense of benevolence.

For most observers, the transformation that has occurred over the past twenty-five years is, with some exceptions, a welcome change. "Reformers" of all ideological and political persuasions find some satisfaction in policy changes that promote "fairness" and "equity." Children's rights advocates have found solace in reforms that provide greater procedural protections to juveniles facing a deprivation of liberty. They laud revisions that have reduced the capricious and discriminatory aspects of indeterminate sentencing. But as Fox observed over 15 years ago: "The demise of treatment in favor of a right to punishment will find few mourners in the conservative ranks."[104] Thus, victims' rights and public protection advocates find comfort in reforms that put more serious offenders behind bars for longer periods of time, whether those bars are in a prison or a training school. In fact, it is this curious political coalition of "reformers" that has enabled the sweeping changes described in this article to take place.

Yet, the move to accountability (and punishment) in juvenile justice has profound implications for the continued viability of the juvenile justice system. Given that the procedural

102. *See* Schneider, *Sentencing Guidelines and Recidivism Rates of Juvenile Offenders*, 1 JUST. Q. 107 (1984).

103. *See* BLUE RIBBON COMMISSION, *supra* note 95 at 40.

104. Fox, *The Reform of Juvenile Justice: The Child's Right to Punishment*, 25 JUV. JUST. 2, 4 (1974).

safeguards in juvenile court are fundamentally the same as those in criminal court (except for bail and trial), that the espoused goals (justice and public protection) are essentially the same, and that the sanctions meted out approximate (or even exceed) those of the criminal justice system, the central question becomes: Why have a separate juvenile justice system?

Indeed, some scholars have concluded that since the rehabilitative ideal has been dismantled,[105] the juvenile justice system itself should—to a greater or lesser degree—be abolished. Some seek simply to eliminate juvenile court jurisdiction over a specified subset of delinquent youths based on the offense.[106] Others want to focus on the age of the juvenile offender. Boland and Wilson, for example, call for an end to the "two-track" system of justice (one for adults and one for juveniles), at least for serious juvenile offenders who, they believe, should be treated as adults.[107] Another popular proposal is to lower the age limit of juvenile (and criminal) court jurisdiction. Wolfgang, for example, advocates placing all persons 16 years or older who commit crimes under the jurisdiction of the adult criminal courts.[108] Van den Haag has a similar approach, only more sweeping: "After age thirteen, juveniles should be treated as adults for indictment, trial and sentencing purposes."[109]

The authors of this article believe that calls for the abolition of the juvenile court are dangerous in the extreme and constitute an overreaction to the problem of serious juvenile crime. We believe that the juvenile court should be retained for three basic reasons: 1) as a practical matter the punitive treatment of juvenile offenders may do society more harm than good; 2) differential treatment of juveniles is consistent with the underlying jurisprudence of criminal responsibility; and 3) imposing the burdens of adulthood only in selected areas (or without granting the concomitant privileges of adulthood) is morally questionable.

---

105. *See generally* Feld, *Juvenile Court Legislative Reform and the Serious Young Offender: Dismantling the "Rehabilitative Ideal"*, 65 MINN. L. REV. 167 (1981).

106. *See, e.g.*, Feld, *Legislative Changes*, *supra* note 31, at 471.

107. *See* Boland & Wilson, *supra* note 23.

108. *See* Wolfgang, *supra* note 31, at 12-13.

109. *See* van den Haag, *supra* note 23, at 249.

### A. *The Questionable Efficacy of Punitive Sanctions*

Committing juvenile offenders to long periods of incarceration, or placing them in an adult prison, has an inherent appeal to those wanting to protect the community and uphold victims' rights. The attraction of this strategy follows, in part, from the belief that harsh sanctions will deter youthful offenders from future criminal activity. For example, Alfred Regnery, former Administrator of the Office of Juvenile Justice and Delinquency Prevention, has stated that "juvenile justice professionals should consider . . . reducing the traditional distinction between juveniles and adults," and that "the deterrent approach should be the main focus of the [juvenile] justice system."[110] At the least, the "get-tough" approach is designed to incapacitate selected juvenile offenders for limited periods so that they are unable to victimize the community. As Van den Haag notes, "[t]he need for social defense or protection is the same" whether the persons victimizing the community are adults or juveniles.[111]

The authors of this article feel this "out of sight, out of mind" approach is short-sighted. For waiver cases, incarceration in prison can be particularly destructive to juveniles. Although there is ample evidence that juvenile facilities are not the therapeutic communities that some would like to imagine,[112] they are less violent and destructive than adult prisons. They are also more likely to provide opportunities for program participation and personal growth. As the evidence presented above suggests, when comparing the experiences of juveniles in prisons to those in training schools, youths in prisons consistently receive less help in programs and personal problem solving; they are also subject to more personal victimization. We believe these experiences will not have the desired deterrent effect. As Forst, Fagan, and Vivona concluded:

> The calculus of transfer policy shown here suggests that the social benefits in terms of public protection and retribution may be offset by the social costs of imprisoning transferred youth . . . . Policy-makers must ask whether society is at greater risk from youth who spend one to

110. Regnery, *Getting Away With Murder—Why the Juvenile Justice System Needs an Overhaul*, 1985 POL'Y REV. 65, 68 (Fall 1985).

111. Van den Haag, *supra* note 23.

112. *See generally* S. LERNER, BODILY HARM: THE PATTERN OF FEAR AND VIOLENCE AT THE CALIFORNIA YOUTH AUTHORITY, THE CYA REPORT PART TWO (1986); Poole & Regoli, *Violence in Juvenile Institutions*, 21 CRIME & DELINQ. 213 (1983).

> three years in a system designed to 'treat' them, or from youth who spend 10-15 years in a system designed to 'punish'.[113]

Except for an extremely small fraction of serious offenders who may be subject to the death penalty, juveniles sent to prison will be released back into society at some point. They may then pose an *increased* threat to public safety. As Judge Wright stated in *U.S. v. Bland*:

> There is no denying the fact that we cannot write these children off forever. Some day they will grow up and at some point they will have to be freed from incarceration. We will inevitably hear from the Blands and Kents again, and the kind of society we have in the years to come will in no small measure depend on our treatment of them now.[114]

Even long periods of confinement in juvenile facilities are of questionable utility. Although on a lesser scale than prisons, violence and intimidation also occur in training schools. Moreover, all too often juvenile institutions simply warehouse youths. The dangers of institutionalization have received considerable attention in the literature regarding mental hospitalization[115] or incarceration in prison.[116] The problem of "prisonization"[117] also applies to youths in training schools. Rather than "correcting" personality defects or improper socialization, prolonged incarceration in training schools can contribute to further solidification of delinquent values and an antisocial lifestyle, either in the behavior exhibited inside the institution or in the community.

The process of prisonization also has implications for deterrence and recidivism. Although both of these concepts are extremely difficult to measure and interpret, there is no reliable evidence that the get-tough juvenile policies have had their desired deterrent effect by lowering the recidivism rate. To the contrary, there is evidence that the longer a youth remains in a training school, the more likely she is to recidivate. Wheeler, in his study of incarceration and recidivism in a midwest juvenile correctional system, concluded that increased

---

113. Forst, *Youth in Prisons*, *supra* note 84, at 11-12.

114. U.S. v. Bland, 472 F.2d 1329, 1349 (D.C. Cir. 1972) (Wright, J., dissenting), *cert. denied*, 412 U.S. 909 (1974).

115. *See, e.g.*, E. GOFFMAN, ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES (1961).

116. *See, e.g.*, D. CLEMMER, THE PRISON COMMUNITY (1966).

117. G. WHEELER, COUNTER-DETERRENCE: A REPORT ON JUVENILE SENTENCING AND EFFECTS OF PRISONIZATION (1978).

lengths of stay in training schools functioned as a "counter-deterrent"[118]—that is, the longer the period of incarceration, the greater the likelihood of recidivism.

Suffice it to say that the data on recidivism and deterrence are presently insufficient to make any hard conclusions. For just that reason, along with Forst, Fagan, and Vivona, we continue to believe that:

> In developing policy for violent delinquents, administrators and legislators should weigh the risks of future crime and violence from exposure to violence in prison, deprivation from the normalizing influences of meaningful contacts with natural social networks, and unmet treatment or remedial needs.[119]

### B. *Diminished Capacity and the Juvenile Offender*

The philosophical underpinnings of the juvenile court have always been problematic. American society has been schizophrenic in its attitudes toward the juvenile offender, as well as toward the juvenile court. Feelings of compassion and humanitarianism for juveniles in trouble (particularly those who cause trouble) have been tinged with fear and vengeance. The move to transform the jurisprudence and goals of the juvenile justice system has at least served one useful function—it has brought society's ambivalence into the open for discussion and analysis and caused a soul-searching evaluation of the nature of the "experiment" launched almost one hundred years ago.

Yet renewed analysis of the nature and goals of the juvenile justice system has, to a great extent, only led to confusion and continued inconsistencies as to the purposes of a separate system of justice for juveniles. Terms such as "just deserts," "punishment," "retribution," "justice," and "accountability," while used in describing changes in juvenile justice, are rarely defined. They are often used interchangeably, and sometimes in contradistinction to one another. California, for example, recently amended its juvenile code to provide that one of the purposes of the juvenile court sanction is "punishment," but the new law also states that the punishment inflicted may not be "retributive"[120] punishment. This qualification appears to obscure rather than to clarify the system's objectives. What kind of punishment is left—so-called therapeutic or humanita-

118. *Id.*
119. Forst, *Youth in Prisons*, *supra* note 84, at 11.
120. CAL. WELF. & INST. CODE § 202(e)(5) (West Supp. 1990).

rian punishment? Is it possible, operationally, to distinguish the administration of therapeutic punishment from retributive punishment? How is therapeutic punishment different from rehabilitation?

One way out of this quagmire, we believe, is to return to some of the basic concepts in legal theory. Underlying the rhetoric of justice and accountability, and consistent with centuries of legal doctrine, is the key concept of criminal responsibility. The traditional basis of the criminal sanction is to expose a person who violates the criminal law to the formal and public moral condemnation of the community.[121] This moral condemnation follows from the assumption that the criminal, having free will, knowingly and consciously chooses to violate the law. Historically, criminal responsibility has been what the social scientists call a dichotomous variable—that is, the defendant is either fully responsible for her actions or is not responsible at all. Traditionally there was no middle ground—the *mens rea* requisite for criminal responsibility was either present or it was not.

Over time, such dichotomous thinking proved to be inconsistent with social reality. The social sciences—as well as centuries of human experience—have shown that there are degrees of culpability and responsibility. Specifically, the idea of a single *mens rea* began to be tempered by empirical knowledge of the realities of human life.[122] Through centuries of legal development, increasingly finer gradations in the mental element of crime have emerged. For example, after reviewing the evolution of *mens rea* in Anglo-American law, Sayre asserts:

> The conclusion to which one is thus driven is by no means a negative one. It focuses our thinking upon the important fact that there is no single precise requisite state of mind common to all crime . . . . An intensive study of the substantive law covering each separate group becomes necessary to reach an adequate understanding of the various states of mind requisite for criminality. The old conception of *mens rea* must be discarded, and in its place must be substituted the new conception of *mentes reae*.[123]

One example of the greater understanding of degrees of the mental element is found in the area of mental illness and

121. *See* Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958).

122. *See generally* Sayre, *Mens Rea*, 45 HARV. L. REV. 974 (1931).

123. *Id.* at 1026.

the law, and specifically in the criminal responsibility of the mentally ill. The dichotomous thinking of *either* sane and totally responsible *or* insane and totally nonresponsible has not squared with modern tenets of psychodynamic psychiatry. The commentary of the American Law Institute's Model Penal Code recognizes this point when it concludes: "The law must recognize that when there is no black and white it must content itself with different shades of gray."[124] The fit between formal legal categories and psychological states of the mentally ill is an issue that legal and medical professions have been wrestling with for decades.[125]

Criminal law doctrine in some states has accommodated the complexity of *mens rea* by incorporating the concept of diminished capacity.[126] Diminished capacity means, in essence, that because of some mental process, state of mind, or status, the defendant did not possess the capacity to form the requisite mental state for the crime charged. The areas in which diminished capacity has been applied in criminal jurisprudence concern behavior committed under the states of heat of passion, intoxication, and mental illness.

We believe the concept of diminished capacity should be incorporated into the jurisprudence of juvenile justice. The recognition of gradations of responsibility concerning criminal acts is consistent with modern theories of child development and psychology. It is also consistent with legal regulations toward adolescents that provide for the incremental extension of privileges and obligations based on age, life experience, and individual maturity.[127] The notion of diminished capacity to form specific criminal intent also implies a diminished responsibility or, as one scholar calls it, "partial responsibility."[128] We propose the term "graduated responsibility" because it more adequately addresses the problems of artificial abstraction inherent in the "all-or-nothing" approaches historically taken to deal with the criminal responsibility of minors.

At common law, a child under age seven was held to be completely nonresponsible for her criminal acts based on the

---

124. U.S. v. Freeman, 357 F.2d 606, 618-19 (2d Cir. 1966) (quoting ALI Model Penal Code, Tent. Drafts, Nos. 1, 2, 3, and 4, at 158).

125. *See generally* J. BIGGS, THE GUILTY MIND: PSYCHIATRY AND THE LAW OF HOMICIDE (1955); Louisell & Diamond, *Law and Psychiatry: Detente, Entente, or Concomitance?*, 50 CORNELL L.Q. 217 (1965).

126. *See generally* Morse, *Diminished Capacity: A Moral and Legal Conundrum*, 2 INT'L J.L. & PSYCHIATRY 271 (1979).

127. See Zimring, *supra* note 7, at 80-86.

128. Morse, *supra* note 126, at 288.

defense of infancy.[129] However, upon reaching the age of eight, the child was deemed to be completely responsible. With the creation of the juvenile court at the turn of the last century, the Progressives committed a similar empirical and legal fallacy when they simply pushed the criminal court's jurisdiction up to the age of eighteen. The jurisprudence of the juvenile court held that all young people coming under its jurisdiction for an act of delinquency were to be considered nonresponsible for their actions. It is in large part this legal fiction of nonresponsibility of juvenile offenders that caused the juvenile court to lose its credibility in the past twenty years. A middle ground—such as that of "graduated responsibility"—which is consistent with notions of criminal responsibility and current evidence of adolescent development, is necessary to preserve the integrity of the juvenile court.

To a great extent, the cut-off age between adolescence and adulthood is arbitrary.[130] The dividing line is in part a social and legal construct. But there is growing documentation in psychology and sociology that adolescents are uniquely different from adults. A substantial body of modern social science and psychiatry recognizes adolescence as a distinct developmental state in life.[131] Moreover, there is evidence that juveniles develop in stages—up through adolescence.[132] Empirical studies have found, for example, that juveniles differ from adults in cognitive thought,[133] moral development,[134] and

129. *See* FOX, *Responsibility in the Juvenile Court*, 11 WM. & MARY L. REV. 659, 660 (1970).

130. *See generally* P. ARIES, CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE (R. Baldick trans. 1962).

131. *See, e.g.*, J. HAVILAND AND H. SCARBOROUGH, ADOLESCENT DEVELOPMENT IN CONTEMPORARY SOCIETY (1981); N. SPRINTHALL AND W. COLLINS, ADOLESCENT PSYCHOLOGY: A DEVELOPMENTAL VIEW (1988).

132. *See generally* Rogers, *Stage Theory and Critical Period as Related to Adolescence*, in ISSUES IN ADOLESCENT PSYCHOLOGY (D. Rogers ed. 1969); Newman & Newman, *Differences Between Childhood and Adulthood: The Identity Watershed*, 23 ADOLESCENCE 551 (1988); E. ERIKSON, CHILDHOOD AND SOCIETY (1963); Kohlberg, *Stage and Sequence: The Cognitive and Developmental Approach to Socialization*, in HANDBOOK OF SOCIALIZATION THEORY AND RESEARCH 347 (D. Goslin ed. 1969); Kessen, *The Concept of "Stages" and "Structure"*, in READINGS IN THE PSYCHOLOGY OF CHILDHOOD AND ADOLESCENCE 23 (W. Meyer ed. 1967).

133. *See, e.g.*, Laursen & Collins, *Conceptual Changes During Adolescence and Effects Upon Parent-Child Relationships*, 3 J. ADOLESCENT RES. 119 (1988); Lockman, Burch, Curry & Lampron, *Treatment and Generalization Effects of Cognitive-Behavioral and Goal Setting Inventions with Aggressive Boys*, 52 J. CONSULTING & CLINICAL PSYCHOLOGY 915 (1984).

134. *See, e.g.*, Kohlberg & Kramer, *Continuities and Discontinuities in Childhood and Adult Moral Development*, 12 HUM. DEV. 93 (1969); L. KOHLBERG,

ego development.[135] Thus, we believe that age *per se* should be a legally relevant variable in any consideration of capacity to violate the criminal law as well as responsibility for criminal activity.

Moreover, a consistent body of case law supports the notion that juveniles, because of their limited maturation, have diminished culpability. In *People v. Wolff*,[136] the California Supreme Court provides one excellent example of this line of thinking. In that case, a fifteen-year-old boy killed his mother and was prosecuted for murder. Upon reviewing Wolff's conviction, the Court concluded:

> In the case now at bench, in light of the defendant's *youth* and undisputed mental illness, all as shown under the California M'Naghten rule on the trial of the plea of not guilty by reason of insanity, and properly considered by the trial judge in the proceeding to determine the degree of the offense, the true test must include consideration of the somewhat limited extent to which this defendant could *maturely and meaningfully reflect* upon the gravity of his contemplated act.[137]

Because this juvenile could not "maturely and meaningfully reflect upon the gravity of his contemplated act," the Court reasoned, "the quantum of his moral turpitude and depravity" was diminished.[138]

The United State Supreme Court, as well, has expressed on many occasions the notion that juveniles are to receive special consideration because of their status. In 1952, for example, the Supreme Court stated that "[c]hildern have a very special place in life which the law should reflect."[139] In *Eddings v. Oklahoma*,[140] the Court noted that this "special place" has generally been recognized in the law, evidenced in part by the fact that every state in the country has a separate juvenile court

---

THE PHILOSOPHY OF MORAL DEVELOPMENT: MORAL STAGES AND THE IDEA OF JUSTICE (1981).

135. *See, e.g.*, Lapsley, Jackson & Rice, *Self-Monitoring and the "New Look" at the Imaginary Audience and Personal Fable: An Ego-Developmental Analysis*, 3 J. ADOLESCENT RES. 17 (1988); Ortman, *Adolescents' Perceptions of and Feelings about Control and Responsibility in their Lives*, 23 ADOLESCENCE 913 (1988).

136. 61 Cal.2d 795 (1964). For a discussion, see Comment, *Keeping Wolff From the Door: California's Diminished Capacity Concept*, 60 CAL. L. REV. 1641 (1972).

137. *Id.* at 821 (emphasis added).

138. *Id.* at 822.

139. May v. Anderson, 345 U.S. 528, 536 (1952).

140. 455 U.S. 104 (1982).

system.[141] The Court also expressed in *Eddings* that juveniles possess a lower level of maturity than adults: "Our [American] history is replete with laws and judicial recognitions that minors, especially in their earlier years, generally are less mature and responsible than adults."[142] "Even the normal 16-year-old," the Court noted, "customarily lacks the maturity of an adult."[143]

The issue of the maturity—and culpability—of juveniles surfaced again in *Thompson v. Oklahoma*.[144] The Court stated:

> There is also broad agreement on the proposition that adolescents as a class are less mature and responsible than adults. We stressed this difference in explaining the importance of treating the defendant's youth as a mitigating factor in capital cases . . . .[145] Inexperience, less education, and less intelligence make a teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally responsible as that of an adult.[146]

This logic leads to the conclusion that "less culpability should attach to a crime committed by a juvenile than to a comparable crime by an adult."[147]

These cases show a longstanding legal tradition and social recognition that in our society juveniles are different from adults. They have diminished capacity maturely and meaningfully to appreciate the gravity of their acts. Because they have diminished capacity, they should also have diminished accountability for those actions. That means that although they should be held partially responsible, they should not be held responsible to the same extent to which adults are held responsible for similar acts.

To be consistent with the learner's permit theory of adolescence,[148] and to give the juvenile justice system greater credibility, it is important to assign juveniles some degree of

141. *See id.* at 116.
142. *Id.* at 115-16.
143. *Id.* at 116.
144. Thompson v. Oklahoma, 487 U.S. 815 (1988).
145. *Id.* at 834.
146. *Id.* at 835.
147. *Id.*
148. *See supra* note 7 and accompanying text.

responsibility for their criminal acts. But this could and should be done within the context of the juvenile court. A system based on diminished or partial responsibility implies that the sanctions would be some fraction or proportion of adult sanctions. The specific quantum of the sanctions would have to be debated and determined by state legislatures. But this is something that legislatures have, in some measure, already undertaken with the juvenile justice reforms. As mentioned earlier in this article,[149] many legislatures have recently made age-based distinctions for imposing more punitive sanctions on older juveniles who commit serious crimes. These jurisdictions have begun to institute a system of "graduated responsibility" which we see as being consistent with adolescent psychology. Moreover, a juvenile system of procedures and sanctions predicated on a principle of "graduated responsibilities" would help bridge the gap between legal theory and adolescent psychology.

### C. *The Morality of Double Burdens*

#### 1. The Questionable Equality of Youthful and Adult Offenders

The current policy trend to treat youthful offenders more punitively raises serious questions about the defensibility of emerging correctional practices and their differential impact on these youths when compared with adult offenders and with nondelinquent youths. Critical attention must be given to policies that appear to promise greater fairness, equality, and public protection by treating youthful offenders like adult offenders, but have the effect in some cases of imposing more burdens on youths than on adults, and of subjecting delinquent youths to higher standards of responsibility than are applied to youths of similar ages in other situations.

Correctional policies that emphasize criminal responsibility within the context of the juvenile justice system place youthful offenders in a double bind. These policies treat the minor as being mature enough to be held responsible for her acts in the way adult offenders are held responsible. At the same time, these policies treat the youthful offender as being immature in her development. She is subjected to differential treatment because of her immaturity; she is placed in a separate correctional system where she is to complete her moral, educational, and social training.

149. *See* text, *supra* at 628.

The double bind resulting from the ambivalent legal status of the youthful offender is particularly evident in the operation of California's juvenile justice system. The interest in extending to juveniles the concepts of equal protection of the law and equal liability for wrongdoing has resulted in imposing special burdens on the youthful offender. While the features of the adult Determinate Sentencing Law (DSL) for increasing prison terms were made available to juvenile court judges, provisions to minimize the severity of the DSL were not equally extended to juvenile offenders.

For example, under DSL adult defendants are presumed to be sentenced to the middle (or "base") term of the tripartite range of prison terms created by the legislature unless aggravating circumstances are proven to warrant the imposition of the upper term. By contrast, juvenile offenders automatically receive the maximum or upper term.[150] The DSL also specifies factors incidental to the offense—for example, causing great bodily injury to the victim or possessing a firearm—which judges may use to enhance the prison term for adults. These factors are equally available to juvenile court judges for extending the confinement term of the youthful offender. On the other hand, the DSL provides for good time and work time credits to all prison inmates which enable adults to reduce their sentence by up to one-half. Yet the application of this provision has been expressly denied to juvenile offenders.[151] Moreover, juvenile court judges have an additional sanctioning option that criminal court judges do not have for subjecting youthful offenders to confinement. A juvenile judge may sentence a youth for confinement at the Youth Authority based on the *entirety* of her criminal record, and not simply the adjudicated offense. This option enables the juvenile court judge to set the confinement term from the most serious offense in the youth's record—an act for which the youth is likely to have already been sanctioned through a prior confinement at a local facility—rather than on the specific offense that precipitated her disposition to the YA.[152]

Such sentencing policies for juvenile and adult offenders in California suggest that youthful offenders are being treated as equals with adults; yet this "equal" treatment largely facilitates the extension of coercive restraints over juveniles. At the

150. *See* CAL. WELF. & INST. CODE § 726.

151. *See* People v. Reynolds, 116 Cal. App. 3d 141, 171 Cal. Rptr. 461 (1981).

152. *See* In the Matter of Aaron N., 70 Cal. App. 3d 931, 139 Cal. Rptr. 258 (1977).

same time, the law has made a juvenile's youthful status a relevant factor for treating her differently from adults, when to do so also serves to extend the period of the state's authority. This differential treatment has been defended out of the desire to give juvenile authorities maximum flexibility in pursing treatment goals with their charges. However, in our view this rationale fails to justify a scheme of differential treatment that appears to subject juveniles to the worst of the two systems.

2. Standards of Responsibility for Youths

Moreover, whether policies to hold youthful offenders to the same degree of liability as adults operate as a result of reforming the goals of the juvenile justice system or of extending the jurisdiction of the criminal system over youths previously subject to the juvenile system, they are inconsistent with standards of maturity and responsibility applied to nondelinquent youth. Policies related to the legal regulation of adolescence are premised on a view of youth as a status involving semi-autonomy and partial maturity. These policies mark the transition from minority to adulthood by gradually increasing the opportunities for young people to act independently and to exercise freedom and judgment. Thus, laws permit youths to engage in certain activities only when they have reached a minimum age, which varies by the activity and state law. In California, for example, a youth may work part-time at age fifteen, drive a car or leave school at age sixteen, marry, vote or join the military at age eighteen, and drink alcohol at age twenty-one.

The sequential phasing of these and related responsibilities and privileges based on age has been society's major strategy for moving youths towards adulthood and full maturity.[153] This strategy acknowledges that responsibility and maturity are not the products of a single event or act, but rather of a process and a range of experiences. Such phasing regulations are intended to expose youths to the learning process essential to developing the ability to make well-reasoned and responsible decisions. At the same time, these regulations seek to protect young people from the full consequences of judgments that reflect their current state of immaturity and inexperience. Phasing policies allow youths to learn from some mistakes without being held fully responsible for them. Such policies also require young people to hold off from having to handle some kinds of mistakes until they have acquired the cognitive or

153. *See* ZIMRING, *supra* note 7, at 108.

emotional strengths to deal with them. For example, in most jurisdictions, the privilege to drink and the privilege to drive are not bestowed by the law at the same age because of the recognition that "the risks generated by learner's mistakes are exponential when learning to drink and learning to drive are mixed."[154]

In recent years, educational norms and requirements for employment have had the effect of extending the period of semi-autonomy, limited responsibility and economic dependence for adolescents. Young people are encouraged to complete high school and obtain college degrees. They are also discouraged from marrying or beginning families of their own while still in their teens. They are discouraged from leaving school to work full-time, especially at jobs offering little opportunity for advancement or growth. Youths reaching their adolescence in the past two decades are better educated than their counterparts were thirty or forty years ago. However, they are facing a world that is technologically, socially, and politically more complex. It is a world that requires higher levels of skill and ability. As one observer has noted, in relative terms "kids have come further, but they have further to go."[155]

Policies that hold youthful offenders accountable for their criminal behavior—based on the view that such behavior is the product of mature and responsible will—are out of sync with policies that govern the legal and social status of adolescents generally. Moreover, these policies run counter to criteria used to set traditional boundaries for the ending of childhood and the beginning of adulthood. As Conrad has noted,

> [T]he school law defines the child; if he is below the school leaving age, he should be in school and is therefore unready for adult responsibilities . . . . Below the school leaving age, a child ordinarily cannot be employed at an adult occupation regardless of his maturity, regardless of whether . . . he is actually attending school. It follows that if he cannot work as an adult, he cannot be held responsible as an adult . . . .[156]

As noted earlier, juvenile justice reforms have created a legal framework that assigns criminal responsibility to youths based largely on the commission of an act. Many of the new transfer laws permit waiver of a youth for criminal processing based on the seriousness of her offense. Several new juvenile codes

154. *Id.* at 109.
155. *Id.* at 19.
156. Conrad, *Crime and the Child*, in MAJOR ISSUES, *supra* note 37, at 184.

include punishment and accountability in their statements of purpose. Such legal frameworks are clearly in conflict with the strategy of phasing and the theory of adolescence that underlies the extension of privileges and burdens to nondelinquent youths.

The emerging legal framework for juvenile justice with its punitive policies toward youthful offenders exposes youths to the full liabilities of their criminal behavior by subjecting them to the processes and sanctions applicable to adults. At the same time, the benefits and freedoms of adulthood are not simultaneously extended. Youths who are transferred to adult court at age fifteen or sixteen, or who are punished within the juvenile court but in accordance with adult penalties, do not by virtue of equal responsibility for their criminal acts earn equality in other respects. At fifteen, they do not earn the privileges of dropping out of school, acquiring a license to drive a car or own a gun, drinking alcohol, and so forth.[157]

As a result of recent reforms, youthful offenders are being asked to bear the liabilities of the two worlds between which they stand—childhood with its attendant dependency and immature judgment but without its protections and nurturance—and adulthood with its attendant obligations and responsibilities, but without its freedoms and independence. The ambivalence and incongruity in contemporary policies toward crime and adolescence raise serious ethical questions for the legal treatment of youthful offenders. The relevant comparison for measuring fairness, equality, and just deserts in policies toward youthful offenders has been the treatment of adult defendants, prisoners, and parolees. While many of the procedures and sanctions imposed on adult offenders have been extended to juvenile offenders, the standard of equality has been limited only to that of bearing equal burdens.

Under revised juvenile codes in many states, the youthful offender is expected to forfeit the semi-maturity and depen-

157. Interestingly, one might say that the criminal process has the effect of reducing all convicted persons to the status of adolescence and semi-maturity in the sense that prisoners, probationers, and parolees are subjected to supervision and control not associated with the treatment of adults but rather with the treatment of youths. Their privacy and opportunities to exercise judgments in matters affecting the quality of their lives and their happiness are sharply curtailed and scrutinized. Prisoners have no privacy; like school children, their every movement is regulated. Probationers and parolees have more independence but they must ask permission to marry, travel, move, or change jobs, and are subjected to random urine tests and warrantless searches.

dency other adolescents her age enjoy. Instead, she acquires, for purposes of punishment, an adult-like status of full responsibility for her behavior. However, in actuality, the "equal" burden becomes a heavier burden for the youthful offender. First, she is held to a standard of maturity and responsibility higher than that applied to her noncriminal youth counterparts. Second, she forgoes, possibly permanently, the period of semi-responsibility and training for her adult life that her adult prison inmates once had and her nondelinquent youth peers continue to have.

Finally, we believe that a class bias has begun to appear in the consequences of more punitive policies toward youthful offenders. This bias suggests yet a third type of burden for the juvenile delinquent. Nondelinquent youths benefit from their adolescent status by being able to complete their development while gradually assuming the burdens and duties of adulthood. One of the most significant opportunities this affords is that nondelinquent youths are able to use their status of economic dependency and semi-responsibility to pursue college educations. Through their post-secondary educations, they are able to acquire the intellectual, social, and emotional skills necessary to live satisfying and successful adult lives. Yet, while institutions of higher learning are accessible, for financial reasons, largely to middle and upper class families, correctional facilities are increasingly being filled with black and Hispanic youths from lower class families.[158] As a result, youthful offenders—often poorly educated and socialized to begin with—are falling further behind other youths in obtaining the skills and experience necessary for making a successful transition to adult productivity and economic self-sufficiency.

## VI. Conclusion: A Call for Moderation

The reforms that have taken place in the past 15 years have, by and large, been beneficial. The time had come to challenge some of the legal fictions created at the turn of the century with the founding of the juvenile court. In the face of empirical realities and an evolving jurisprudence of youth, it was time for adjustments in the juvenile justice system. However, advancing empirical evidence has also reconfirmed the fundamental premise of the early juvenile reformers: that

158. See I. Schwartz, (In)Justice for Juveniles: Rethinking the Best Interests of the Child 47 (1989) (noting that minority youth now comprise about 50% of all the juveniles confined in publicly operated juvenile detention and correctional facilities in the United States).

juveniles are different from adults. Although the boundary dividing childhood from adulthood will, of necessity, remain somewhat arbitrary, we believe that a separate and distinct status for juveniles should be maintained, as should the juvenile court.

Juveniles must assume some measure of responsibility for their actions. But the responsibility should be graduated, based on the phasing concept of juvenile maturation. Juveniles should not have to bear the same level of responsibility—or the same sanctions—as adults. A system of graduated responsibility and sanctions will not only restore credibility to the juvenile justice system, it will also be more consistent with current conceptions of adolescent psychology and criminal law doctrine.